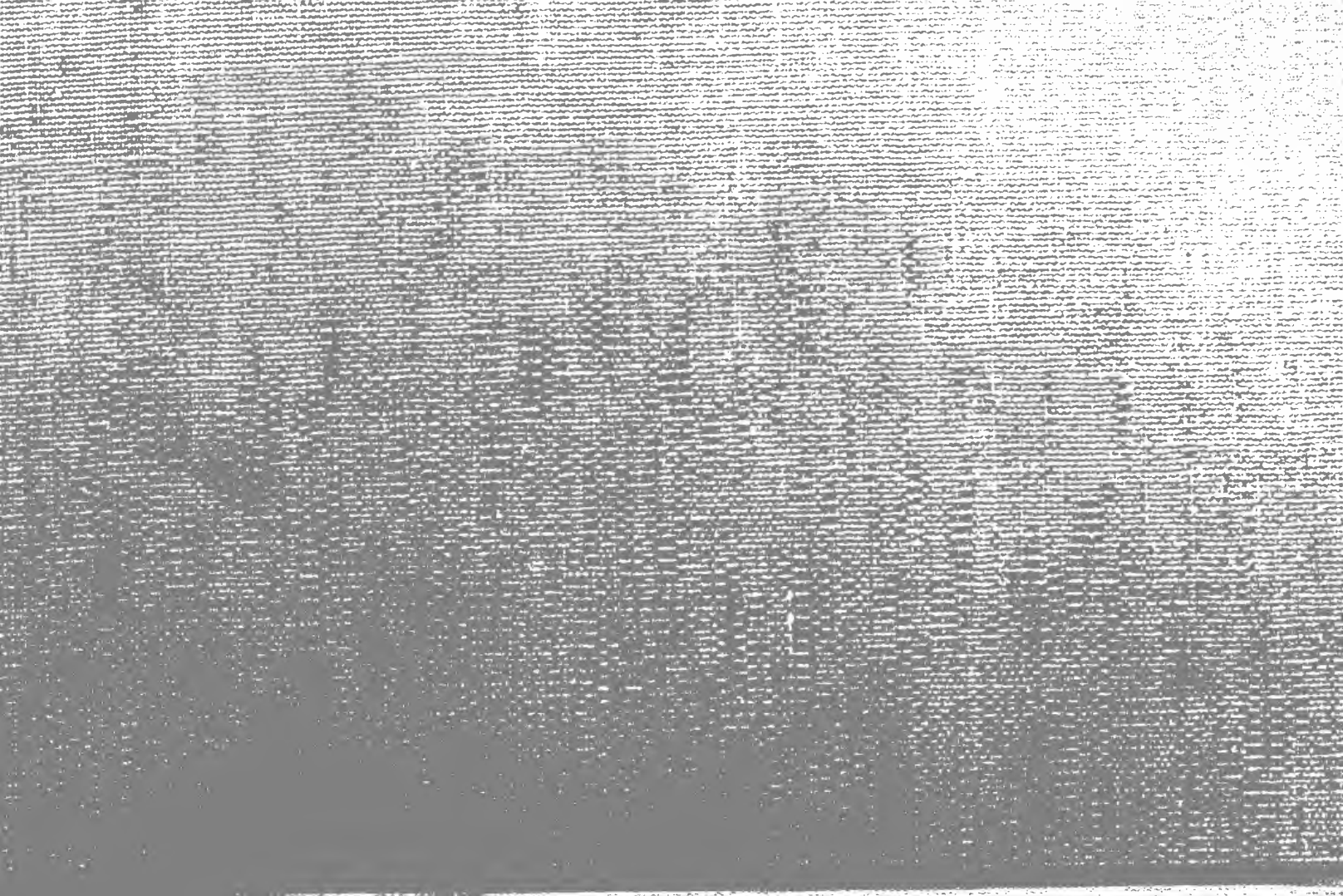

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NO. 16366

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN L. OWEN,

Appellant,

v.

SEARS, ROEBUCK AND COMPANY,
a Corporation,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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For Appellant.

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STEVENS-NESS LAW PUB. CO. PORTLAND, ORE. 4-59

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NO. 16366

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Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

JURISDICTIONAL STATEMENT

This is an appeal by John L. Owen, plaintiff below, from a judgment entered by the United States District Court for the District of Oregon by direction for the defendant below (Tr. of Record 15).

The action below was commenced by a complaint filed by John L. Owen claiming damages in the sum of $40,000.00 against Sears, Roebuck and Company, a corporation, for the breach of an implied warranty, by reason of which John L. Owen was permanently injured

(Tr. of Record 4-5). The plaintiff below was a citizen of the State of Oregon and the defendant below was a citizen of the State of New York (Tr. of Record 7).

The United States District Court for the District of Oregon had jurisdiction of this cause by virtue of USCA Title 28, Sec. 1332.

This Court has jurisdiction of this cause by virtue of USCA Title 28, Secs. 1291 and 1294.

STATEMENT OF THE CASE

On July 15, 1955, the appellant was wearing a sports shirt which had been purchased by his wife from the appellee. The shirt was of the pullover variety with short sleeves and two buttons at the neck. The shirt had been purchased about May of 1955 and had prior to the day in question been kept in a dresser drawer at home with other wearing apparel of the appellant. It was a cotton shirt and had a polished finish (Tr. 4-6).

On the day in question, the appellant's wife was working outside the home and the appellant was home, it being a Saturday, taking care of their children and doing light housework. He had completed the housework, took a bath and, in putting on clean clothes, chose the shirt in question.

The appellant sat down on the davenport and lighted a cigarette. It was a warm day and there was a breeze blowing through an open window immediately in front of the davenport upon which appellant was sitting. The appellant took a puff or two of the cigar-

ette and the shirt burst into flames, either because of contact with the match or the cigarette (Tr. 30). The appellant rushed to the bathroom while attempting to tear the shirt from his body. By the time the shirt was ripped off and the flames stomped out, there was nothing remaining of the shirt except the collar. Part of the shirt had stuck to his back and was still burning when he reached the bathroom. Appellant was also wearing an undershirt (T shirt) which likewise burned (Tr. 27). Appellant received burns upon his right chest and right underarm, as well as along his back. He put on another shirt, called a neighbor to care for his children and immediately sought medical attention (Tr. 8-10).

Appellant was confined to a hospital for a period of about three weeks, during which time he was given sedatives frequently for pain. After being discharged from the hospital, appellant was visited regularly by his doctor who would change the bandages and treat an infection which developed from the burns (Tr. 15-14). Scars from the burns were present and visible at the time of trial (Tr. 18).

Appellant's wife was an employee of appellee and she purchased the shirt in question from the appellee sometime in May of 1955. It was a cash sale and was purchased from the men's section of the department store (Tr. 40-45). She was not certain of the trade name of the garment, but she testified that it had a polished finish (Tr. 40-41). After she purchased the shirt, she put it in a drawer with the rest of his clothing. Appellant had not worn it before the day in question, nor had it been cleaned by appellant or anyone else. She testified

that she believes the original pins were still in the shirt up to the day of the accident (Tr. 44). All that remained of the shirt was a collar which was found in the bathroom the evening of the fire and which was thrown in the garbage (Tr. 45).

As noted above, appellant's wife purchased the shirt from the respondent because she was able to obtain an employee's discount. She personally purchased most of appellant's clothes at Sears for that reason, and she was so authorized to do by the appellant (Tr. 46, 58, 72). The garment in question was cotton, light in weight and had a smooth, glossy finish (Tr. 46).

Dr. David C. Frisch, a dermatologist, testified that he examined the appellant on the 17th day of April, 1958, for burn scars on the right side of his chest and right arm. Five by five inch scars were present on his upper arm, and on his lower arm they were of a size of about six by seven inches. They were superficial second degree and deep second degree burns and they were permanent (Tr. 51). Appellant suffered discomfort because of his inability to prespire in the scarred area and his discomfiture was likewise of a permanent nature (Tr. 55).

STATEMENT OF POINTS

1. There was substantial evidence presented in the trial of this cause from which the jury could find that the respondent sold a garment which was not reasonably fit for the purpose intended.

2. There was substantial evidence presented from which the jury could find that the garment in question was sold by the appellee to the appellant.

3. Any requirement of notice of breach of warranty under the Uniform Sales Act (Oregon Revised Statutes 75.490) was satisfied by the appellant.

4. The appellee waived any requirement of notice of breach of warranty under the Uniform Sales Act (Oregon Revised Statutes 75.490).

Point I

There was substantial evidence presented from which the jury could find that the appellee sold a garment which was not reasonably fit for the purpose intended.

Barrett v. S. S. Kresge Co., 31 Pa D & C 379;
Blessington v. McCrory Stores Corporation, et al, 305 NY 140, 111 NE 2d 421, 37 ALR 2d 698;
Deffebach v. Lansburgh & Bro., 80 App D C 185, 168 ALR 1052, 150 F2d 591;
Jelleff, Inc. v. Branden, 233 F2d 671;
Lohse v. Coffey, 32 A2d 258, 261;
Ringstad, et ux, v. I. Magnin & Co (1952), 39 Wash 2d 923, 239 P2d 848;
Uniform Sales Act (ORS 75.150(1));
Uniform Sales Act, (ORS 75.490).

ARGUMENT

At the conclusion of appellant's case, the trial court, in granting appellee's motion for a directed verdict stated:

> "Now, the question is here we are dealing purely with a breach of contract. The plaintiff's evidence is that the garment was purchased from the defendant. The evidence then shows that in the course of

> lighting the cigarette his shirt burned. I see absolutely nothing that shows that the garment was not constructed, did not represent all that it was warranted to be. So, I am forced to grant the motion."

The evidence is undisputed that the shirt being worn by the appellant burst into flames while he was lighting a cigarette and he was badly burned before he could tear the garment from his body (Tr. 9-10). Nothing remained of the shirt except the collar which was thrown into the garbage can by appellant's wife (Tr. 18). This being so, the court's holding was either a declaration that shirts commonly are made of material or treated with a substance which causes them to react as this garment did when coming into proximity with an open flame or the glow of a cigarette; or, was a finding as a matter of law that the appellant's testimony was completely unworthy of belief in the absence of proof of the construction of the garment and the manner in which it was treated. Neither position is tenable.

The Uniform Sales Act (Oregon Revised Statutes 75.150 (1)) provides:

> "Where the buyer, expressly or by implication, makes known to the Seller that particular purpose for which the goods are required, and it appears that the buyer relies on the Seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

The case of *Deffebach v. Lansburgh & Br.*, 80 App D C 185, 168 ALR 1052, 150 F2d 591, leaves little doubt as to the inferences that may be drawn from testimony present in the instant case. The Deffebach

case was one where a chenille lounging robe was purchased from appellee's store. About the third or fourth time she wore it she was badly burned. The undisputed testimony was that she waived or "fanned" a match after lighting a cigarette, that the robe caught fire, and that the flame spread with great rapidity, "quicker than you snap your fingers almost," in spite of immediate and vigorous efforts of several persons to put it out. On appeal, it was conceded that the only question in the case was whether or not the garment was reasonably fit for use as a robe. The Court said:

> "Since outer garments intended for domestic wear are not unlikely to come into momentary contact with lighted matches, tobacco, or stoves, it seems to us clear that a robe which, when this contact occurs, instantly bursts into flame and inflicts severe injury is unreasonably dangerous and unfit for use. Accordingly, we think the jury should have been instructed that if the robe caught fire and burned as the witness testified, there was a breach of appellee's implied warranty of fitness." (Reversed).

In *Jelleff, Inc. v. Branden,* 233 F2d 671, the appellee purchased a finger-tip or hip length "brunch" coat or smock from the appellant. She wore the garment only two or three times. On the day in question, she was preparing a meal and the smock came into contact with the outer ring or rings of the burner on her electric stove. The smock was buttoned down the front but hung in a flaring fashion. She first noticed the smock was afire when the flames reached her chest. The flames spread rapidly through the right half of the garment and, as she ran from the kitchen to the bathroom, various charred portions of the garment fell to the floor

and burned spots in the rug. Part of the garment fell into the tub and was thrown out by the janitor. The garment burned with such intensity that it melted or fused a buckle and the strap on her brassiere and burned the imprint of the strap into her back. "It went so fast that I couldn't get the canister down in time to bring down my arm to protect myself." The Court cited with approval their holding in the Deffebach case and, in affirming the verdict for plaintiff, held that the jury was justified in inferring that the garment was not reasonably suited for the purpose it was obviously intended.

Also see *Ringstad et ux v. I Magnin & Co.* (1952), 39 Wash 2d 923, 239 P2d 848; *Blessington v. McCrory Stores Corporation, et al,* 305 NY 140, 11 NE 2d 421, 37 ALR 2d 698.

The cases cited are squarely in point. The Deffebach case teaches us that if the garment comes into "momentary contact" with a lighted match or cigarette and it "bursts into flames," a jury would be justified in finding that the seller had breached his implied warranty of fitness. That case does not require the appellant to go further and establish by direct evidence the construction of the garment, if, and how, it may have been treated chemically, and its propensities when exposed to heat. Indeed, as in the Jelleff case, supra, the appellant could not have done so as the garment was completely destroyed by the flames, with the exception of the collar which was thrown out in the garbage.

As was said in *Lohse v. Coffey,* 32 A2d 258, 261:

"Here, where the claim rests upon the implied warranty, plaintiff needed to prove (as we have pointed out above) only that he suffered an injury as a result of a breach of such warranty; in other words, his case was easier to prove. For the purpose of this discussion there can be no question that he proved the injury. But did he prove the first element in the case—that the food was tainted? The fact that Monarch, who ate the same solids also became ill was evidence of such taint. His physicians testimony that if the food was tainted it 'was a competent producing cause' of the trouble, was also clearly acceptable proof. The two taken together supply a firm footing for the verdict. Nor is this basing inference upon inference, for the only element not proven factually (or by opinion evidence) was that the food was tainted. This the jury was entitled to infer from the other evidence.

"We do not say that plaintiff made out a perfect, unassailable case, or one which was proven to a scientific demonstration. Nor was he required to do so in order to get to the jury.

"Only the most litigious plaintiff would have had the presence of mind, in the throes of intermittent attacks of vomiting and diarrhea to arrange for laboratory tests and chemical analyses of his vomitus and excreta to be brought into court to prove his case. A man can hardly be expected to prepare a lawsuit while writhing on an ambulance strecher or a hospital bed."

Obviously, the appellee in the instant case was in a much better position to know the type of garment it was retailing to the general public. This the trial court apparently recognized but ignored (Tr. 94). As was said in *Barrett v. S. S. Kresge Co.,* 31 Pa D & C 379, where the court held an implied warranty was present in the purchase of a dress which was impregnated with dye:

"We see no distinction in reasoning or principle between the present situation and the foodstuff cases, universally recognized as the subject of implied warranties of fitness for use for the purpose for which the materials or products are sold. Here are cheap garments manufactured and sold in lots of thousands. The manufacturer and retailers are obviously the only ones in a position to control and know the character and effect of the materials used in their manufacture, and no housewife can be expected to risk the chance of poisoning by a substance contained in an ordinary article of clothing designed and sold expressly for human wear."

Point II

There was substantial evidence presented from which the jury could find that the garment was sold by the appellee to the appellant.

Davis v. Van Camp Packing Co., 176 NW 382, 17 ALR 649;
Klein v. Duchess Sandwich Co., 14 Cal 2d 272, 933 P2d 799;
Shysky v. Drake Brothers Co., 192 App Div 186, 182 NY Supp 459;
ORS 75.150 (1);
Restatement, Agency, Vol I, Sec. 20;
Restatement, Agency, Vol I, Sec. 22.

ARGUMENT

A person who has capacity to affect his legal relations by the giving of consent has capacity to authorize an agent to act for him with the same effect as if he were to act in person. Restatement, Agency, Vol I, Sec. 20. A husband or wife may be authorized to act for the other party to the marital relationship. Restatement, Agency, Vol I, Sec. 22.

Thus, in the leading case of *Davis v. Van Camp Packing Co.,* 176 NW 382, 17 ALR 649, where an ultimate consumer was poisoned by eating canned pork and beans which he had burchased from a retailer who had bought the same from a jobber to whom the manufacturer had sold them, it was held that the manufacturer could be held liable upon the theory of implied warranty of wholesomeness, notwithstanding there was no privity of contract between the consumer and manufacturer. In reaching this conclusion the Court pointed out that manufacturers of food, especially of canned food, must exercise the highest degree of care; that the better rule is that the production and sale of an article of food carries an implied warranty that it is fit for human consumption, except, perhaps, where the contrary is observable; and, upon the question of implied warranty, the question as to privity as not controlling. (Accord: *Shysky v. Drake Brothers Co.,* 192 App Div 186, 182 NY Supp 459.)

And in *Klein v. Duchess Sandwich Co.,* 14 Cal 2d 272, 933 P2d 799, 140 ALR 246, under a statute which was identical with ORS 75.150 (1), that Court held that a proper jury question was presented upon evidence that a husband and wife stopped at a restaurant and the husband at the wife's direction procured a ham and cheese sandwich for her, which was wrapped in wax paper and sealed with metal clamps, delivered to the restaurant by the manufacturer about an hour before, upon eating part of which she discovered the presence of maggots and became acutely ill. The Court further held that there was sufficient privity of contract to support

the manufacturer's liability to the ultimate consumer upon the implied warranty as to the fitness of the food, that the statute did not contemplate only the existence of such a warranty running from an immediate seller to an immediate buyer, and that the intervention of a middleman, at least under such close circumstances, made no difference. And as to the contention that recovery was precluded because the wife was not the buyer within the meaning of the statute and that consequently there was no privity of contract between the seller and his wife, the Court observed that although the evidence showed that the wife "sent" the husband for the express purpose of purchasing the sandwich, thereby technically becoming the "buyer" within the terms of the statute, nevertheless no such technical privity of contract as was contended for was necessary in order to enable her to recover as an ultimate consumer, stating that:

> "The warranty as to the fitness of foodstuff for human consumption was not intended to be solely for the immediate 'buyer', but was intended to be for the benefit of the ultimate consumer—the existence of privity of contract not being essential in an action brought by such consumer on the warranty theory. To allow a recovery by such third person, who may have consumed unwholesome food purchased by another, would not impose a greater burden on the manufacturer or on the immediate seller of the food than would be thus imposed if the original purchaser had been injured by reason of the consumption thereof—since the warranty extended to every consumer is that the food is fit for the purpose for which it was intended, namely for human consumption."

It would appear obvious to the appellant that the laws of agency and common sense would require a holding in the instant case that privity, if necessary, has been established between appellant and the appellee.

Point III

Any requirement of notice of breach of warranty under the Uniform Sales Act (ORS 74.490) was satisfied by the appellant.

Barni v. Kutner, 45 Del 550, 76 A2d 801;
Baum v. Murray (1945), 23 Wash 2d 890, 162 P2d 801;
Henderson Tire & Rubber Company v. P. K. Wilson & Son, 235 NY 489, 139 NE 583;
Kennedy v. F. W. Woolworth Co., 205 App Div 648, 200 NYS 121;
Maxwell Co. v. Southern Oregon Gas Corporation, 158 Or 168, 74 P2d 594;
Murphy Laboratories, Inc. v. Emery Industries, Inc., 95 F Supp 651;
Ringstad v. I Magnin & Co. (1952), 39 Wash 2d 923, 239 P2d 848;
Rogiers v. Gilchrist Co., 312 Mass 544, 45 NE 2d 744;
Silverstein v. R. H. Macy & Co. (1943), 266 App Div 5, 40 NYS 2d 916;
Sylvester v. R. H. Macy & Co., 265 App Div 999, 39 NYS 2d 1000;
Texas Motorcoaches v. A. C. F. Motors Co., 154 F2d 91;
Whitfield v. Jessup (1948), 31 Cal 2d 826, 193 P2d 1;
Oregon Revised Statutes 75.690 (1);
Oregon Revised Statutes 75.490;
Williston on Sales, Vol. III, Sec. 484.

ARGUMENT

One of the grounds urged by the appellee in his motion for a directed verdict was that the appellant's cause was fatal because of lack of reasonable notice of breach of warranty (Tr. 85).

Oregon Revised Statutes 75.690(1) provides:

> "Where there is a breach of warranty by the seller, the buyer may, at his election (b) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty * * * ."

Oregon Revised Statutes 75.490 provides:

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefore."

The act does not prescribe the form of any notice mentioned therein. *Whitfield v. Jessup* (1948), 31 Cal 2d 826, 193 P2d 1. Any notice required may be oral, *Baum v. Murray* (1945), 23 Wash 2d 890, 162 P2d 801; *Ringstad v. I. Magnin & Co.* (1952), 39 Wash 2d 923, 239 P2d 848. The commencement of the action itself affords sufficient notice of a breach of warranty under the Act. *Silverstein v. R. H. Macy & Co.* (1943), 266 App Div 5, 40 NYS 2d 916.

Likewise, the cases vary as to the substance of any notice required. Such notice should be "clear and unambiguous." *Texas Motorcoaches v. A. C. F. Motors*

Co., 154 F2d 91; it should be "unequivocal." *Murphy Laboratories, Inc. v. Emery Industries, Inc.,* 95 F. Supp 651; it should refer to particular sales and fairly advise the seller of the defects, *Rogiers v. Gilchrist Co.,* 312 Mass 544, 45 NE 2d 744; it should apprise the seller of the fact that the buyer is making a claim for damages or is asserting a violation of its rights, *Whitfield v. Jessup,* supra, *Barni v. Kutner,* 45 Del 550, A2d 801.

The nature of the case and its particular facts and circumstances are important in determining whether any requirement of notice has been satisfied. *Barni v. Kutner,* supra. Appellant contends that the reason for the rule has no application to the facts and circumstances of this case.

In *Silverstein v. R. H. Macy & Co.* (1943), 266 App Div 5, 40 NYS 2d 916, damages were sought for personal injuries sustained as a result of defendant's breach of warranty of a chinning bar and a new trial was ordered after plaintiff appealed from a judgment dismissing his complaint. One of defendant's contentions on appeal was the plaintiff had failed to plead or prove compliance with the Sales Act in respect to giving notice within a reasonable time. The Court held that such requirement had no application to a situation similar to that kind, citing *Kennedy v. F. W. Woolworth Co.,* 205 App Div 648, 200 NYS 121; and *Sylvester v. R. H. Macy & Co., Inc.,* 265 App Div 999, 39 NYS 2d 1000; *also see Maxwell v. Southern Oregon Gas Corporation,* 158 Or 168, 74 P2d 594.

In the *Kennedy* case, supra, damages were sought for injuries occasioned by the eating of candy purchased

from the defendant. That Court held that the complaint was sufficient irrespective of lack of notice; that the notice mentioned in the Sales Act had no relation to goods purchased for immediate human consumption and did not apply to the facts and circumstances of the case. The Court said the section requiring notice is relevant only in situations where there is a sale of goods whose inspection or use discloses a defect of quality, lack of conformance to sample, failure to comply with description, or other cognate circumstances, which causes money damage to the vendee. (Accord: *Maxwell Co. v. Southern Oregon Gas Corporation,* supra.)

The obvious intent of the Sales Act is to place upon the buyer the duty of inspecting the goods after title and possession has passed to him by his acceptance of them, and to give reasonable notice to the seller of any defect in quality, lack of conformance to sample or failure to comply with description. If such notice is given, the buyer may then return the goods or keep them and bring an action against the seller. Oregon Revised Statutes 75.690.

As stated in Williston on Sales, Vol. III, Sec. 484,

> "A rule seems desirable which is capable of some certainty in its application and also on the one hand avoids the hardship on the buyer of holding that acceptance of delivery and the property in the goods necessarily deprives him of the seller's obligations, and on the other hand avoids the hardship on the seller of allowing a buyer at any time within the period of the statute of limitations to assert that the goods were defective, though no objection was made *when they were received.* With this in

mind the positive requirement of prompt notice was inserted in the statute." (Italics supplied)

Assuming, arguendo, that the statute contemplates notice in all cases, it would seem to follow that such a condition prior to action was excused in the present case and that the commencement of the action was sufficient notice because the law does not require something to be done for the mere form of it. If a notice were to be given, it was for the purpose of enabling the person to whom it was given to act. *Henderson Tire & Rubber Company v. P. K. Wilson & Son,* 235 NY 489, 139 NE 583.

The appellant had no information which he could have given the respondent by notice that would enable the latter to act. The shirt was destroyed (Tr. 45). It was a cash sale (Tr. 45). The exact date of purchase was unknown (Tr. 39). Appellant wasn't even certain of the price paid for the garment, or of the trade name (Tr. 40, 41, 46, 64). Appellant was not certain whether the shirt had two or three buttons down the front (Tr. 65). About all that the appellant could have told the seller was that he purchased a pink, cotton shirt, sometime in May, and that it had a polished finish. Naturally, the seller's most logical step would then be to determine if the garment or any part of it were still in existence so that it could be identified and tested. This inquiry would have received a negative reply and, considering the number of transactions the appellee undoubtedly made within this same period of time and within the same price range, identification would have been impossible.

For the foregoing reasons, appellant submits that the complaint was sufficient notwithstanding the failure to plead or prove any notice.

Point IV

The appellee waived any requirement of notice of breach of warranty that may be required under the Uniform Sales Act (ORS 75.490).

Fowler v. Crown-Zellerbach Corporation, CCA Or 1947, 163 F2d 773;

Owen v. Schwartz, CA 1949, 177 F2d 641, 85 US App DC 302;

Washington v. General Motors Acceptance Corporation, DC Fla 1956, 19 FRD 370;

Federal Rules of Civil Procedure, Rule 16;

Rules, United States District Court for District of Oregon, Effective June 20, 1958.

ARGUMENT

The Rules of the United States District Court for the District of Oregon, effective June 30, 1958, with Revisions to July 31, 1958, provide in part:

"Rule 34

Pretrial Conferences

(a) At least one pretrial conference, pursuant to Rule 16 Federal Rules of Civil Procedure, shall be held in every civil case unless the Court orders otherwise.

(b) When the parties so agree, with the approval of the Court, the pretrial order may supercede the pleadings, and in that event the pleadings go out of the case. Otherwise, the pretrial order shall be supplemental to the pleadings."

Rule 16 of the Federal Rules of Civil Procedure contemplate that when the parties have limited their contentions and issues to be decided in a pretrial order and the same has been approved by the Court that they are confined to those issues during trial, unless modified to prevent manifest injustice. *Owen v. Schwartz,* CA 1949, 177 F2d 641, 85 US App DC 302; *Washington v. General Motors Acceptance Corporation,* DC Fla 1956, 19 FRD 370.

The pre-trial order which was approved by the Court and entered sets forth the issues to be determined at the trial (pp. 9, 10, Transcript of Record) as follows:

"1. Did plaintiff purchase a shirt from the defendant?

2. If so, was the shirt which plaintiff purchased of highly flammable type and by reason thereof, not fit for use as wearing apparel?

3. Did the defendant breach its warranty of fitness for purpose?

4. Did plaintiff receive injuries as a direct and proximate result of defendant's breach of warranty?

5. If so, what is the amount of plaintiff's damages?"

It is clear that the parties intended to be limited to their contentions and the issues as set forth in the pretrial order (Tr. 67, 68), and the appellee was, therefore, foreclosed from asserting as a ground for a directed verdict the failure of plaintiff to plead or prove notice. Nor can respondent assert it before this Court. *Fowler v. Crown-Zellerbach Corporation,* CCA Or 1947, 163 F2d 773.

CONCLUSION

It is submitted that the trial Court erred in finding that a jury question was not presented as to the fitness of the garment sold as demonstrated under Point I, and that it also erred in refusing the plaintiff a new trial as demonstrated under Points II, III and IV.

Respectfully submitted,

NICHOLAS GRANET

No. 16367

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR A. ARNHOLD, et al, *Appellants,*

vs.

UNITED STATES OF AMERICA, et al,

BRIEF OF APPELLANTS

FERGUSON & BURDELL
W. H. Ferguson,
Donald McL. Davidson,
Attorneys for Appellants.

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Seattle 1, Washington

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JURISDICTION

The District Court had jurisdiction of this action under 28 U.S.C. §§ 1331, 1332, 1346(b) and 2671-2680.

This court has jurisdiction of the appeal under 28 U.S.C. §§ 1291 and 1294(1).

QUESTIONS PRESENTED

Did negligent acts of the Government and the Port Angeles and Western Railroad (hereinafter referred to as the "PAW") in creating a fire hazard on their lands terminate when a fire that originated there was temporarily brought under control before causing damage to the plaintiffs?

Did negligent acts of the Government and the PAW in failing to take proper action to suppress and extinguish a fire at its inception and during its first days terminate when the fire was temporarily brought under control before damaging the plaintiff?

Was the creation and maintenance by Fibreboard of a large and heavy concentration of slash on its lands together with other acts and omissions in fighting the fire on its lands a negligent contributing cause to the damage caused by the Heckleville fire?

SPECIFICATIONS OF ERROR

The District Court erred in the following respects:

In making and entering Amended Finding of Fact XV that the plaintiffs had failed to show that Fibreboard was negligent by a preponderance of the evidence.

In making and etering Amended Findings of Fact and Conclusions of Law that the United States and the Railroad were not liable for the negligence found although such negligence self-evidently caused or contributed to the stipulated damages.

The particular portions of the Findings and Conclusions which are erroneous are set forth in Appendix A.

THE RECORD

Pursuant to order of the court entered on or about February 9, 1959, the appellants were granted leave to appeal upon the typed transcript of the trial proceeding in the court below. References to that portion of the record are designated by the abbreviation "Tr." An index to the witnesses and exhibits is incorporated in this brief as Appendix B. References to the printed portion of the record are designated by the abbreviation "R."

SUMMARY OF THE FACTS

Mid-day on August 6, 1951, a Port Angeles Western Railroad locomotive started seven or eight small

spot fires along its right of way in the Sol Duc district in the Olympic National Forest in Northwest Washington (R. 175). All but one of these fires were extinguished that day before they caused any material damage (R. 209-210, 184, 195). The other fire, known as the Heckelville fire, was not extinguished and "eventually grew into the conflagration which gives rise to this litigation." (R. 175.) Both the railroad and the United States were—and had been for some years—negligent in maintaining the right of way at Heckleville, which constituted a fire hazard (R. 214). The PAW refused to take any responsibility for fighting the fire (Tr. 87). The Government was negligent in attacking the fire for the first several days (R. 198), during which period it burned over 1,600 acres. On September 20, 1951, it burned over some 20 miles into the town of Forks, Washington (R. 178). On that day, homes, furnishings and businesses belonging to the individual plaintiffs and property insured by the plaintiff insurance companies was destroyed (Finding XI). It was stipulated that the value of the property destroyed was $300,261.31 (R. 173).

A. *The Tinder*

The spring and summer of 1951 were among the driest on record in the Sol Duc district. Burning conditions were severe in August of 1951 resulting from below-normal rainfall and less than usual relative humidity.

The area had been officially described as a region of extra fire hazard for over a month prior to the outbreak of the fire (Finding VIII, R. 209).

The railroad right of way was owned by the defendant United States. The Port Angeles and West-

ern Railroad Company (hereinafter sometimes called the "PAW") operated over the right of way as vendee under an executory conditional sales contract. The contract required compliance with all state and Federal fire laws and regulations and reserved to the United States the right to inspect the right of way and the right to use the right of way "for purposes not inconsistent with use thereof by PAW for railroad purposes." (R. 221, 243.) The railroad had been financially unable to comply with these restrictions and had been frequently in default on its contract payments to the United States for some years prior to August, 1951 (Tr. 22-23). For these reasons the railroad permitted its right of way to fall into a substandard and fire-hazardous condition. Weeds, trash and brush of various sizes and types grew near and between the tracks. About 25 per cent of the track ties were rotten. Discarded rotten ties had been left on the right of way in some sections within a few feet of passing trains (R. 174-175). In November of 1945, Sanford Floe, United States District Ranger, wrote the PAW requesting that it clean up its right of way, including the general area of the Heckleville fire (Tr. 41). Similar written or oral requests were made thereafter. The railroad advised Ranger Floe that it didn't have the money to comply (Tr. 45, 811). As a result, conditions gradually got worse all along the right of way. The District Ranger knew of these conditions at the time and regarded the right of way as a fire hazard, including the area in Section 30, Township 30, N.R. 10, W.W.M., the section where the Heckleville fire started (Tr. 459). Neither the Railroad nor the Ranger did anything to abate these conditions al-

though the Ranger and other government officials had frequently noted the hazardous conditions from 1936 through January 17, 1951 (Tr. 813, R. 10-11, Ex. 15, 16, 17, 18, 19, 20, 21, 22 and 23). District Ranger Floe "recognized it as a fire hazard" because "fire might get away from it." (Tr. 465.)

Both the "PAW and United States failed to use ordinary care in maintaining the railroad right of way generally, and specifically in the area of the Heckleville fire, in a reasonably fire-safe condition." (Finding XII, R. 211.) The PAW was "negligent in allowing fire hazardous conditions to exist on its right of way generally and in the particular area where the Heckleville fire started." (R. 184.)

> ". . . the United States, through the Forest Service, by direct and frequent observation of its experts particularly trained and experienced in the matter, had actual knowledge of the substandard conditions respecting fire hazard on the PAW right of way and of the fact that no remedial action was being taken or contemplated by PAW in violation of its express commitments to the United States. In these circumstances reasonable care required corrective action by the United States effective well prior to August 6, 1951 (R. 193-194).
>
> "The United States both as a landowner in the particular circumstances and by reason of the cooperative agreements, owed the duty to require or provide, through the Forest Service, proper maintenance as to fire precautions on the PAW right of way in the Heckleville area. The absence thereof . . . constituted negligence chargeable to the United States." (R. 194-195.)

B. ***The Spark***

The PAW locomotive started the fire at Heckleville at a few minutes after noon on August 6, 1951

during an eastward run from Ozette Junction (Tr. 302) to Fibreboard Camp One (also known as the Sol Duc Station) (Tr. 4333). The train crew stopped for lunch at about 11:15 at Flight (Tr. 303) discovering and putting out a small fire in an old tie beneath the train (Tr. 304). The train resumed its eastward trip at about noon, passing through the Heckleville area about five minutes after twelve (Tr. 305-306) and arrived at Fibreboard Camp One at about 12:15 (Tr. 313). Another fire had been spotted by the train crew during this run and the conductor immediately phoned Snider Ranger Station to report it and the earlier fire the train crew had extinguished (Tr. 345). He then called his superiors on the railroad. The conductor remained at the phone continuously for several hours so he could be available (Tr. 348, 352). Immediately after dropping off the conductor, the equalizer bar of the engine broke, preventing it from reversing (Tr. 307, 310) and going back immediately to the scene of the fire the train crew had sighted. Subsequently the equalizer bar was repaired, but the engine went off the rails and had to be rerailed (Tr. 315) so that it did not take any action on any of the fires until some time after 4:30 p.m. (Tr. 316). By that time the Heckleville fire had spotted out of control of the three Forest Service employees who had belatedly arrived at the scene.

C. *The Initial Attack*

At 12:30 the Forest Service lookout reported a one-eighth acre fire on the railroad right of way to District Ranger Floe at the Snider Ranger Sta-

tion. It was the first fire reported to him that day (Tr. 527) and was immediately west of the Heckleville fire.

> ". . . fire in or near heavily forested lands during a hot and dry fire season, such as occurred in the Sol Duc District from early spring until late fall, 1951, is universally recognized by foresters in Washington, and generally elsewhere, as extremely dangerous and as having a tremendous potential for damage to life and property. It is well recognized; that small fires in the forest shortly following inception may be readily controlled and suppressed by prompt and thorough action; that such fires easily and rapidly spread and rarely remain small or die out unattended without active control and extinguishment; and that forest fires by the minute are more difficult and dangerous to confine and control as they spread under conditions of wind, heat and low humidity. For these reasons, ordinary and reasonable care requires urgent speed, vigorous attack and great thoroughness in reaching and putting out fire in the forest. In the early stages of fire fighting action a few minutes delay, a man or two less than needed, and too little of the right kind of equipment may, any one of them make the difference between a small fire quickly disposed of with little or do damage and a conflagration of extensive proportions resulting in great loss of life and property." (R. 196-197.)

Heckleville is a little more than three miles from Snider Ranger Station along the Olympic Peninsula Highway. It is just over a mile from Fibreboard Camp One.

Heckleville was at the center of a 20-mile circle of timbered land, worth millions of dollars—most of which to the south and west was under the con-

trol of the Forest Service (Tr. 705). Most people in the area depend upon the timber industry for their living (Tr. 708, Finding VI, R. 208, 230). At the time the Heckleville fire was first reported to District Ranger Floe, he knew of the hazardous condition existing along the right of way and of the likelihood that any fire starting there might get away (Tr. 465). He also knew that there was a rising hill to the south of the Heckleville spot fire, that there were small saplings and tangled second growth in the area, and a large accumulation of slash above the spot where the fire started and that virgin timber extended many miles to the west and southwest from the slash (Tr. 712). Floe was charged by contract to protect lands in the area, a duty the plaintiffs knew of "and reasonably relied upon." (Finding V, R. 208.) He was "very much" concerned with what the Heckleville fire would do if it got into such inflammable material (Tr. 583). "On August 6, 1951, at and prior to the time when the Heckleville spot fire occurred, District Ranger Floe knew . . . that a fire in that area which was not extinguished might burn continuously and progressively and might burn property for many miles in any direction including westerly and southerly to the Pacific Ocean" (Am. F. IX, R. 232) including the town of Forks (Tr. 739). He knew that fire tends to grow geometrically with the time it is left unattended (Tr. 736). He knew that if fire ever got into the adjacent slash area (Tr. 697) with a strong wind behind it (Tr. 698) there was a good chance it would burn through the valleys to the west to or beyond the town of Forks, although he might have a fighting chance if the wind

were not so strong (Tr. 699). He was well aware, as was anyone with fire-fighting experience, that mid-afternoon is usually a critical time in controlling a fire because of lower humidity at that time, progressive drying of fuels by the sun and the likelihood of afternoon winds (Tr. 779).

Ranger Floe, absent any report from his assistant in the field, was aware of the fact that the Heckleville fire was spreading from the time it was reported and that it would continue to spread at an accelerated rate (Tr. 766).

No one arrived at the Heckleville fire between 12:05 p.m., August 6, 1951 when it was started, until about 2:30 p.m. when Assistant Ranger Evans arrived at the scene (Tr. 1012) with three men (Tr. 1009). At that time he radioed a report of the fire to District Ranger Floe (Tr. 1024) but did not then ask for any additional men or equipment (Tr. 1026, 1028). The fire had then spotted ahead in two places and by 3:00 was out of control (Tr. 1029, 1030, 1031). At 3:00 p.m. Mr. Evans reported the fire was out of control (Tr. 1029). He left the scene of the fire and began walking down the tracks to Fibreboard Camp One. Up to approximately 2:00 p.m. the 4-man train crew could have extinguished the fire (Tr. 537). At 2:30 p.m. ten men or less could have extinguished it (Tr. 608-609, 1038). By 3:00 p.m. it would have taken a hundred (Tr. 1041).

The Heckleville fire was reported to District Ranger Floe at 1:00 p.m. by the fire lookout at North Point. The base of the fire was observed, its location given and its size reported as one-eighth of an acre (Tr. 526-527, 734).

Prior to that time Ranger Floe had called the timekeeper at Fibreboard Camp One and asked him to tell the PAW crew to return with their engine to the fire sighted at 12:30 (Tr. 535-536, 537). He had not called any one else prior to 1:00 and for some time thereafter called no one in connection with the second reported fire. He assumed the engine would go back down the track to the first fire and its crew would automatically discover and extinguish the Heckleville fire (Tr. 866). On that account he didn't give any attention to getting any other equipment to the Heckleville fire (Tr. 536). Up to 2:00 p.m. Ranger Floe relied solely upon Firebroard's timekeeper to locate the train crew and get it moving toward the fires (Tr. 541, 828). He did nothing from the time the fire was reported until he finally learned the PAW engine was broken down, except to make fruitless calls to the timekeeper at Fibreboard Camp One (Tr. 757, 940). Either through ignorance (Tr. 535) or carelessness he did not call for the train crew on the PAW telephone at Fibreboard Camp One, although the conductor had been standing by that phone from 12:15 on and Floe was very anxious to get in touch with him. Floe could have driven to Fibreboard Camp One in ten minutes (Tr. 535). He knew men were available at Fibreboard (Tr. 721) but didn't ask them to go to the fire. In his thinking it was "just a routine fire out there for a couple of miles" (Tr. 725). He did not recall trying to get in touch with his assistant Mr. Evans and made no note of such an attempt to call him (Tr. 548). He was not in touch with Mr. Evans until about 1:45 when Evans called him (Tr. 549).

> "Through sad experience I have called for crews and told some person to tell them to go

some place, and then get unholy balled up, so I wanted to talk personally to the man that was going to the area to know if he knew where he was going to, and to understand my instructions."[1]

His first call when he did learn that the PAW locomotive was broken down was to advise the PAW's general manager that it must pay the cost of securing a substitute engine from Rayonier (Tr. 757) — a clutchfistly attitude more appropriate where lives and property are not in jeopardy.

The Heckleville fire was about thirty or forty minutes away from Ranger Floe's station by road (Tr. 575)—only three and one-half miles away on a direct line (Tr. 2915). It was within half an hour of Fibreboard Camp One (walking along the track (Tr. 1165) and half an hour away from the State fire station (Tr. 767). By 2:05 the North Point lookout reported "fire across from Heckleville going strong"—at which point Ranger Floe finally decided he needed more men (Tr. 561-562). At 2:35 he called for men from the State Fire Fighting Crew (Tr. 564). At 2:40 he called for men and equipment from Fibreboard (Tr. 565) and asked Rayonier "to roll men" (Tr. 566). At 2:47 he notified the administrative assistant to the National Forest Service re-

[1]Mr. Floe said this was the reason he did not request fire fighters from the state fire station at Tyee when he called there about 2:10 p.m. This call was merely to alert the men and to have someone stand by (Tr. 563). For something approximating an hour and a half immediately previous he had been relying upon a Fibreboard timekeeper to locate and dispatch a four-man train crew to both the first and second fires. The Government's primary expert witness, Mr. Colville (Tr. 3984, felt it was imprudent for Ranger Floe to rely upon the train crew without supervision or follow-up past 1:30 (Tr. 4146).

gional supervisor at Olympia (Tr. 567). At the time these men were ordered the fire was already spotting out of control.

By the evening of August 6, 1951 the Heckleville spot fire had covered some 60 acres. The court said:

> "After fair allowance for all of the difficulties and uncertainties confronting Floe and his subordinates and the limitations under which they were required to perform their duties, the inference clearly arises from the evidence that the Heckleville spot fire was not attacked as promptly, vigorously and continuously as ordinary care required . . ." (Mem. Dec. 23)

When it got dark on the evening of August 6, 1951, the Heckleville fire died down. All of the men on the fire were then withdrawn except for a few Rayonier men with pumps (Tr. 1183), and some PAW men whose only function was to guard some railroad bridges outside the perimeter of the fire (Tr. 131, 132, 231-232, 271-272). They did some work between 8:00 p.m. and midnight, putting out fire in the ties (Tr. 273).

D. *First Breakout*

During the evening of August 6, Ranger Floe and his assistants drew up a plan of attack upon the 60-acre fire the next day.

Some 143 men worked on the fire on August 7 (Tr. 615). A few Forest Service employees got to the fire at about 4:30 a.m. (Tr. 1074, 1467). The bulk of the men, however, did not get to the fire lines until some time after 5:30 a.m. (Tr. 615-616) and perhaps not until 6:00 or 7:00 o'clock in the morning (Tr. 616-617, Tr. 1075, 1395, 1396). It was safe to work in the woods sometime before 5:00

a.m., sunrise on August 7 (Para. IX, Pre-trial order, R. 18).

According to the Forest Service Manual,

> "Failure to attack at 4:00 o'clock a.m. violates first law of fire fighting." (Tr. 781, 2790).

a "law" Ranger Floe knew and believed should be followed if it was possible to do so (Tr. 781).

The PAW took no independent action against the fire. In fact, when the Forest Service asked the PAW on the 7th if it wanted to take over the fire, its general manager refused, saying:

> "It is on your property and I don't think it is our responsibility now." (R. 87)

On the morning of the 7th there was no wind (Tr. 1066) and it was cool (Tr. 1546). These conditions prevailed until the early afternoon (Tr. 1074, 1547). It was in fact a day much like the day before (Tr. 1475). Just as happened the day before and at the same hour (between 2:30 and 3:00 p.m.), the wind came up and the fire spotted over the incomplete fire line and went out of control (Tr. 1078).

> ". . . it became apparent that we weren't going to be able to hold the line that we had opened up. The fire was coming around both sides of it. We hadn't been able to extend it long enough, and I doubt whether we would have been able to have held it in the middle, even. There wasn't a wide enough burned out area to be safe that we would have a chance there." (Tr. 1567.)

The fire escaped first into slash on the Government's land (Tr. 3527) and then into slash on Fibreboard's land (Tr. 2011-2012).

On the 6th, the Heckleville fire grew unattended from a spot fire to several acres and then escaped three men into 60 acres. The following day it grew from 60 to 1,600 acres. The court found that District Ranger Floe and his subordinates "failed to act as promptly, vigorously and continuously as they were required to do in the exercise of ordinary care in attacking the Heckleville fire and in attempting to confine it to the 60-acre area" (Am. Finding XV, R. 234-235) and that "negligence chargeable to the United States proximately contributed to spread of the fire to the 1,600-acre area." (R. 203, Memo. Decision.) The findings do not disclose the precise basis of this finding but the evidence is overwhelming that Ranger Floe was negligent in the following particulars at least:

In failing to work on the fire during the night of August 6 (Tr. 779, 782-783);

In failing to attack at dawn on August 7 (Tr. 780, 2778);

In failing to summon enough men and equipment to get the fire under control by 10:00 a.m. on the 7th (Tr. 779, 2790).

E. ***Mop-up***

By August 10, "fire lines completely encircled the 1,600-acre area and to the extent that the fire was confined within that area it was under control." (R. 198, Memo. Decision.)

From that date until September 20, 1951 when the Heckleville fire broke away for the third time, the Forest Service undertook mop-up activities in the 1,600-acre area. The railroad took no part in any mop-up activities.

> "Some traces of fire continued to erupt in various parts of the affected area, particularly in two former logging landings referred to as 'L-1' and 'L-2,' " (R. 177-178, Memo. Decision.)

The court discussed only two of the particular acts of negligence charged during the mop-up period. The court said plaintiffs had failed to show by a preponderance of the evidence that the Forest Service was negligent in not providing a night patrol on September 19-20[2] and in not anticipating the hazardous weather forecast for September 20, 1951.[3] It appears, however, that these and other allegations of negligence (Pre-trial order, Para. XXXV g, h, i, j, k, l, m, R. 51-52) were dismissed upon the basis that

> "if negligence be assumed in any particular charged, causal relationship between such negligence and the breakout and spread of the fire on the early morning of September 20 is a matter of speculation and conjecture and not shown as a reasonable probability."

These negligent acts involved little or no dispute as to the facts. In general, they involved letting known fires continue to smolder underground, particularly at an old center of logging, known as a "landing" (and sometimes referred to as "L-1" or

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[2]Night patrols were provided and men worked without injury in tall timber, slash and steep terrain on the nights of August 7, 8 and 9 (Tr. 4173) and night fire-fighting successfully knocked down a blaze that broke out on the evening of September 13, 1954, see infra, p. 16).

[3]Mr. John Lehy, the timber sales officer at the Ranger Station (Tr. 1381) who was a division boss in the early stages of the fire (Tr. 1395), recollected that he, at least, knew that the humidity was dropping on September 19. His superiors at the time of trial could not remember their knowledge of weather conditions existing and forecast on the evening before the breakaway.

"Landing 1" herein), right on the fire line; failing to work on fire suppression during the two days it rained—rain makes smoldering fires steam or smoke so they can be located and extinguished (Tr. 3075); and in progressively abandoning mop-up after September 1, 1951 in the hope that heavy rains would complete the mop-up (Tr. 199) as Forest Service summer employees left for school (Tr. 1110).

F. *Second Breakout*

During the late mop-up period, the skeleton crew then patrolling the fire would put out any flames they saw before leaving for the night only to find others springing up in the same area afterwards (Tr. 1539-1540).

On September 13, 1951, at about 2:30 in the afternoon fire broke out near L-1 (Tr. 1108). The fire escaped into a stump in the midst of some slash outside the fire control lines (Tr. 1244-2145). A four-man suppression crew with a tank truck were on hand and extinguished that blaze. The crew came in and reported the fire out Tr. 1218) sometime between 5:00 and 6:00 o'clock (Tr. 1219-1220). That evening at about 7:30 Mr. Evans drove to Heckleville to check and saw that the fire had again broken over the fire lines in the same area (Tr. 1219, 1222). He called for a fire crew and had the second breakout under control by about 2:00 a.m. (Tr. 1223). Despite the lucky chances on September 13 that twice saved the Heckleville fire from escaping, mop-up efforts continued to decrease. No night patrol was maintained after that date and only two men worked on mop-up after the two nar-

row escapes on the 13th. The landings continued to smolder and were observed to be smoking on September 18 (Tr. 1513).

G. ***Third Breakout***

At some early hour on September 20, 1951, an east wind fanned the smoldering Heckleville fire into life. Unseen, unattended and unobserved the renewed fire grew. At about 3:15 a.m. it exploded in the classic pattern of a runaway fire. It spread first into the three quarter sections of Fibreboard slash south and west of L-1 (R. 233).

At 3:15 the State fire lookout at Gunderson Mountain—miles from Heckleville—made the first report: "The Forest Service fire was broke loose." (Tr. 1704.)

Ranger Floe was awakened at 3:45 a.m. by a phone call from Rayonier's logging camp, with a report of the fire. He could then see a glow in the sky Tr. 693).

Mr. Evans was awakened and told of the fire at 4:00 a.m. (Tr. 1114).

A passing motorist got Ted Drake out of bed to report the fire (Tr. 1513). He was third in fire command after Mr. Floe and Mr. Evans. Drake drove to Heckleville about 4:30 a.m. (Tr. 1515, 1517) and observed the flames burning "very high and very hot" (Tr. 1518) adjoining the west side of the 1,600-acre burn (Tr. 1514-1515). It was "a tremendous lot of fire" (Tr. 1515) with flames shooting up 300 feet and he "was kind of stunned by it, by the fire" (Tr. 1516-1518).

While State fire wardens, logging companies and motorists reported the breakaway to the Forest Service the blaze grew rapidly (Tr. 1628). By about 5:30 a.m. spot fires had advanced to Bigler Mountain (Tr. 1717) some four miles from the Heckleville slash (Tr. 1628) with scattered fires all in between (Tr. 950, 1719).

Mr. McDonald, District Forest Warden for the State of Washington (Tr. 1669) was an eyewitness of the Heckleville fire breakaway (Tr. 1705). He drove to within 50 feet of the fire (Tr. 1706) and within 100 feet of Landing 1 (Tr. 1714) at or shortly before 4:00 a.m. (Tr. 1708). The fire was then located around Landing 1 (Tr. 1707), the 1,600-acre area to the east not having any fire in it (Tr. 1708, 1764) nor any smoke (Tr. 1765). The fire was then burning in and around the landing (Tr. 1710, 1730) and extended west across the road into the ajacent slash area (Tr. 1707). There was solid fire from the landing to the west as far as he could drive or see (Tr. 1712). There was "really a wall of fire" (Tr. 1715).

At about the same time as Mr. McDonald was at the fire (Tr. 654) Ranger Floe observed fire burning in the three quarter-sections of slash immediately west of Landing 1 (Tr. 654). He was then about three miles away from the fire, near the Ranger Station (Tr. 695) but was familiar enough with the area to locate the area then burning (Tr. 655). Instead of burning with a reddish cast the "material was burning whiter than I have ever seen anything before," which meant it was burning "with intense heat" (Tr. 4542).

Mr. Walker and Mr. Cunningham, camp foreman (Tr. 1845) and logging superintendent for Rayonier (Tr. 1878) drove to Heckleville at about 4:00 a.m. They observed lots of fire on the hill (Tr. 1859). It was racing up the hill toward unburned timber visible over the flames (Tr. 1904).

The State fire warden was in charge of fighting the fire at Forks. By 7:00 a.m. the school superintendent called off school and warned school buses to stay out of town. Loggers were told to get out of the woods (Tr. 1720-1721). By 9:30 a.m. the Heckleville fire was about a quarter of a mile from the town, advancing slowly from the east along a mile and a half front (Tr. 1722-1723).

Early in the morning the streets of the town were covered with ashes and at noon it was dark as night from the pall of smoke (Tr. 1723). The fire burned some 20 buildings, timber, bridges, machinery—everything in its path. A large prairie east of town in the path of the flames was the only thing that saved the entire town from destruction. The fire continued to burn for three days until the rain came and stopped it (Tr. 1724-1725).

The Heckleville fire had realized its "tremendous potential for damage to life and property" (R. 197). The Heckleville fire—born and nurtured in negligence—had done the damage "universally recognized by foresters in Washington" (R. 197). The Forest Service believes that:

> "To have a fire that has been controlled and apparently mopped up start anew, hours, days, weeks later, can only be classed as someone's inexcusable failure" (Tr. 785, Ex. 151, p. 38).

SUMMARY OF THE ARGUMENT

The court correctly found the law of the State of Washington applicable to the duties of landowners and others respecting fire fighting (with the exception of liability for slash). The court correctly found that an Act of God acting upon a condition previously created through negligence or concurrently with negligence does not relieve the negligent actor (R. 180, 201).

Having determined that defendants were negligent in creating and maintaining a fire hazard at Heckleville and in failing to attack and extinguish the fire, the court had no foundation in fact, law or logic in dismissing the action against the Government or PAW.

Fibreboard was negligent in maintaining fire hazardous slash upon its premises.

I. ***Applicable Washington law found by the court.***

> "The owner or occupant of land in or near a forest area who with due care starts fire on such land for a lawful purpose, such as land clearing, must exercise ordinary and reasonable care to prevent spread of the fire to the damage of others. Failure to perform such duty is negligence rendering the party guilty thereof liable for all damage proximately resulting therefrom. * * *" (R. 178).
>
> "The owner or occupant of forest land who, regardless of purpose, negligently starts a fire on such land which, with or without his further negligence, spreads to damage others is liable for all damage proximately caused by such fire." *Ulrich v. Stephens,* 48 Wash. 199, 93 Pac. 206 1908); *Jordan v. Welch,* 61 Wash. 569, 112 Pac. 656 (1911); *Seibly v. Sunnyside,* 178 Wash. 35

P. 2d 56 (1934) [see R.C.W. 76.04.220 and *Spokane International Railway Co. v. United States,* C.A. 9 (1934), 72 F. 2d 440, attaching civil liability to violation of the standard of care established by criminal statute] (R. 179).

"An owner or occupant of forest land with knowledge of a fire burning on such land, even though started by strangers, must exercise ordinary and reasonable care to prevent spread of the fire to the damage of others. Failure to do so is negligence rendering the landowner or occupant liable for all damage proximately resulting therefrom." *Sandberg v. Cavanaugh Timber Co., supra; Jordan v. Spokane, Portland & Seattle R. Co.,* 109 Wash. 476, 186 Pac. 875 (1920); *Galbraith v. Wheeler-Osgood Co., supra;* and see R.C.W. 76.04.380 (R. 179).

"All damages of a kind reasonably foreseeable as a consequence of the failure to exercise reasonable care for the restraint and suppression of a fire may be recovered against the negligent party. To constitute an intervening independent cause as a break in the chain of proximate causation precluding recovery against a negligent defendant, Acts of God or negligence of others must be the sole proximate cause of the damage complained of. The burden of going forward with evidence sufficient to sustain a finding of intervening, independent, proximate cause rests on the party asserting it. If negligence of a defendant in starting or in failing to confine or suppress a fire combines and concurs with the negligence of others or with Acts of God to proximately cause damage to third parties, such defendant is liable for the whole of the damage so caused." *Stephens v. Mutual Lumber Co.,* 103 Wash. 1, 173 Pac. 1031 (1918); *Lehman v. Maryott & Spencer Logging Co., supra; Galbraith v. Wheeler-Osgood Co., supra; Burnett v. Newcomb, supra; Walters v. Mason*

County Logging Co., 1939 Wash. 265, 256 Pac. 749 (1926); *Mensick v. Cascade Timber Co., supra; Seibly v. Sunnyside, supra; Tope v. King County,* 189 Wash. 463, 65 P. 2nd 1283 (1937); *Teter v. Olympia Lodge,* 195 Wash. 185, 80 P. 2d 547 (1958); *Blessing v. Camas Prairie Railroad Co.,* 3 Wn. 2d 267, 100 P. 2d 416 (En Binc 1940); *Berglund v. Spokane County,* 4 Wn. 2d 309, 103 P. 2d 355 (1940); *Sitarek v. Montgomery,* 32 Wn. 2d 794, 203 P. 2d 1062 (1949); *Theurer v. Condon,* 34 Wn. 2d 448, 209 P. 2d 311 (1949); *McLeod v. Grant County School District,* 42 Wn. 2d 316, 255 P. 2d 360 (En Banc 1953) (R. 179-180).

"One who by contract assumes a pre-existing duty of another to provide fire protection and furnish firefighting service is liable to third parties relying on prudent performance of such duties for damage proximately caused by failure to exercise reasonable care in the performance of the assumed duties. In such situation a disclaimer of liability between non-governmental contracting parties will not bar recovery by the third party for damage resulting from negligent performance of the assumed duties." *Sheridan v. Aetna Casualty and Surety Co.,* 3 Wn. 2d 423, 100 P. 2d 1024 (En Banc) (1940); *Western Auto Supply Agency of Los Angeles v. Phelan* (C.A. 9 (1939), 104 F. 2d 85. (R. 180-181).

II. ***There is no rational basis in law or fact in holding that the fire-hazardous condition upon the right of way did not contribute to the spread of the Heckleville spot fire.***

A. ***An eyewitness account of the moment of ignition is not required.***

". . . the court has found PAW negligent in allowing a fire-hazardous condition to exist on

its right of way generally and in the particular area where the Heckleville fire started" (R. 184).

Two sentences later, the court said:

> ". . . It simply cannot be determined from the evidence with any degree of certainty or with reasonable probability and without inference on inference where, how or why the fire ignited, nor whether any excess of combustible material on the right of way was actually at the initial point of the fire" (R. 184-185).

The Heckleville fire was burning along the railroad track some 300 feet when first observed.

One man with a back pack can easily put out a small fire, which is why back pack cans are required at slash burning fires (Tr. 2115). Indeed, common sense alone dictates that you can snuff out a match (Tr. 2778-2779). "Even an ordinary person would know that if he sees a fire start, if he drops a match in the woods, that the important thing is to stamp it out, to act quickly" (Tr. 2981).

The court itself commented that there was no need of expert testimony to prove that "if a fire is so small three or four fellows can get over and put it out" (Tr. 2364).

> "No one testified that he saw the sparks fall from the engine upon the right of way. It is rarely that this can be shown by eyewitnesses, for it would usually happen that if the sparks were seen at the moment of falling and igniting the stubble, the fire would be put out by the observer." *Williams v. Atlantic Coastline R. Co.,* 140 N.C. 623, 53 S.E. 448, 449 (1906); Accord *Abrams v. Seattle & Montana R. Co.,* 27 Wash. 507, 512, 68 Pac. 78, 79 (1902); *Simmons v. John L. Roper Lumber Co.,* 174 N.C. 220, 93

S.E. 736 (1917); *Moore v. Rowland Lumber Co.*, 175 N.C. 784, 95 S.E. 175 (1918).

Had a jury been instructed that the plaintiff must prove by direct eyewitness testimony precisely "where, how or why the fire ignited" and that an "excess of combustible material on the right of way was actually at the initial point of the fire" it would have been clear error. Had a trial court refused to permit a jury to find that negligently accumulated combustibles upon the right of way caused or contributed to the ignition of the fire upon the right of way, because it "cannot be determined from the evidence with any degree of certainty" in the absence of eyewitness proof it would have been clear error. There is no authority anywhere for imposing such a burden upon a plaintiff. Its application would of necessity defeat any recovery for fire damage. Such an observer's failure to exercise slight care might justly be viewed as the primary cause of the fire's escape, bordering upon criminal negligence.

The ludicrous result obtains that upon the issue of duty of the defendant the court found "a fire hazardous condition to exist . . . in the particular area where the Heckleville fire started" (R. 184) and two sentences later found that it would require "inference on inference" to determine whether or not "any excess of combustible material on the right of way was actually at the initial point of the fire" (R. 184). This logic chopping rested upon no facts in the record and was directly contrary to the court's own belief that

> "I recognized in thinking about it . . . that a poorly-kept right of way would, of course, be more likely to contribute to starting the fire . . ." (R. 268).

B. ***Direct proof that the negligent accumulation of combustibles contributed to the spread of the Heckleville fire was uncontradicted.***

The trial court, concluding that direct proof of the place of initial igniting of the Heckleville fire was lacking, summarily applied the same conclusion to the cause of its subsequent spread. There was direct, unequivocal and uncontradicted evidence that the negligently accumulated combustibles contributed to the spread of the fire.

When first seen, the fire was burning on the ground in stumps, downed logs and "ordinary litter that accumulates over a period of years." Material burning within the rails and for ten feet on either side was the same, except that there was no stump that close. The fire had started within a slight cut and burned over "grass and the same type of vegetation and dead brush that accumulates over a period of years." The ties on the railroad grade were on fire (Tr. 1013, 1665). Ties were so decayed they splintered at a kick and there were stumps 20 to 30 feet way from the ties (Tr. 1013). Old ties were scattered along the roadbed (Tr. 1148). Of the five fires Mr. Evans saw on August 6, the Heckleville fire had the most inflammable debris around it, was the driest and was most susceptible to burning (Tr. 1150).

At 3:30 the ties were seen flaming in the right of way (Tr. 1665). Mr. LeGear, vice-president and general manager of PAW (Tr. 13), arrived at the fire at about 5:30 on the afternoon of August 6, 1951 (Tr. 191). He testified that the fire was then burning in the brush and ties in the tracks and in ties piled alongeside the tracks, the grass having already burned off (Tr. 192).

If sparks fall into rotten ties "there is a very strong chance of such sparks . . . starting smolders which under the pressure of a little air movement will burst into flames" (Tr. 2340). On the other hand:

> "You might sit and throw cigarettes into a bunch of pine needles all day and not be able to start a fire, but you throw that cigarette on some punky wood and chances are a hundred to one it will burn" (Tr. 3074).

Among all fuels "rotten ties rank as a number one tinder box. As a matter of fact, the early pioneers used to use rotten wood to catch a spark with their flints, it is such an excellent source of tinder" (Tr. 2698).

There are not differing requirements of proof of negligence and proof of proximate cause. One does not rest upon an inference that the court is compelled to draw and the other require inference upon inference. The same proof supports both equally.

> "The respondent was not obligated to prove these facts by the direct evidence of an eye witness." *Abrams v. Seattle & Montana R. Co.*, 27 Wash. 507, 512, 68 Pac. 78, 79 (1902).

Only if it can be said that the origin and spread of the fire in the right of way was "equally, or else with reasonable certainty, attributable to other probable causes" were plaintiffs required to exclude such other causes (174 Wash. at p. 648). Even so, plaintiffs were not required "to meet conjecture or mere possibilities with proof to the contrary, for if such were the rule "there could hardly ever be a case where negligence and consequent liability could be established by circumstantial evidence for it would be easy to advance some theory not wholly

barren of reason but which in the very nature of things it would be impossible to meet with proof." *Sommer v. Yakima Motor Coach Co.,* 174 Wash. 638, 645, 26 P. 2d 92, 195 (En Banc 1953).

The same fact that compelled a finding of negligence in the maintenance of the fire hazardous right of way compells a findings that the litter contributed to the spread of the fire.

> "It might reasonably be inferred that [the fire] was communicated to the weeds and grass on the right of way because of Appellant's negligence in allowing such an accumulation of combustible matter in such close proximity to the line of its tracks and that it escaped from the right of way because of the same act of negligence." *Chicago, St. L. & P. R. Co. v. Williams,* 13 Ind. 30, 30 N.E. 696, 697 (1892).

C. ***Ranger Floe's negligence was the proximate cause of plaintiff's damage as a matter of law. (1) Having actually realized that the accumulation of debris at Heckleville might cause a forest fire encompassing plaintiff's property, and (2) knowing that the failure to take diligent action on the Heckleville fire would have the same result.***

The consequenceless negligence found by the court below contains within itself a fundamental error of law. Its plausibility rests only upon superficial juggling of concepts.

Defendants were found negligent in two respects:

1. In maintaining the right of way as a fire hazard; and

2. In failing to take proper action against the inevitable fire when it occurred.

What consequence is the hypothetical reasonable man charged with anticipating or foreseeing as a result of these negligent acts?

The first act of negligence could only result in the ignition and spread of fire. If this is not the consequence a reasonable man should foresee then there is no negligence.

The second failure—negligence in combatting the negligently existing fire—could only result in the continued existence and spread of the fire. If this was not the consequence to be expected by a reasonable man there is simply no negligence.

The negligence consisted of creating an unreasonable risk of a fire occurring and escaping to the damage of the plaintiffs. That risk existed before the fire started and it never terminated. The court repeatedly so characterized the risks.

> ". . . in the heavily forested state of Washington where there is great hazard of vast injury and damage from forest fire, the State law places upon an owner of land either containing timber or in the immediate vicinity of timber lands, the duty to exercise reasonable care concerning maintenance of his premises as to fire precautions . . ." (R. 193).

> "fire in or near heavily forested lands during a hot and dry fire season, such as occurred in the Soleduc District from early spring until late fall 1951, is universally recognized by foresters in Washington, and generally elsewhere, as extremely dangerous and as having a tremendous potential for damage to life and property" (R. 196-197).

> "In the early stages of firefighting action a few minutes' delay, a man or two less than

needed, and too little of the right kind of equipment may, any one of them, make the difference between a small fire quickly disposed of with little or no damage and a conflagration of extensive proportions resulting in great loss of life and property" (R. 197).

". . . a poorly kept right of way would, of course, be more likely to contribute to starting the fire or its spread afterwards" (R. 268).

"negligence chargeable to the United States proximately contributed to spread of the fire to the 1,600-acre area" (R. 203).

"If there were no fire in the 1,600-acre area . . . fire could not have escaped from it . . ." Nobody is suggesting that plaintiffs' damage came from any other source . . . (R. 259).

These findings were, of course, compelled by the facts of the particular case. Ranger Floe was well aware of them, both as general principles and as specifically applicable to the Hecklevile fire.

By 2:05 p.m. on August 6, 1951 District Ranger Floe was "very much" concerned with the explosive potential of the Heckleville fire (Tr. 583-4). He then expected the fire to travel into an area of downed timber "laying on the ground just like jackstraws" (Tr. 582).

For some years he had recognized that the combustible litter along the right of way (Tr. 456-458) in Section 30 (where the fire started) was a fire hazard (Tr. 459) and he was afraid of it because "Fire might get away from it" (Tr. 465). At all times up to September 20, 1959 Ranger Floe knew of the huge accumulation of inflammable debris adjacent to the fire lines. He and the State Forester "both knew that the fire was going down this valley

and the fuel in there would put it into Forks or beyond Forks" if there was a strong east wind (Tr. 697).

> "Knowledge of danger is in law knowledge of the injurious results naturally and proximately flowing from that danger." *Nordstrom v. Spokane & Inland Empire R. Co.,* 55 Wash. 521, 525, 104 Pac. 809, 811 (En Banc 1909).

Under the state of facts found by the court and the finding of negligence before, at and after the inception of the Heckleville fire there can be no question of causation.

> ". . . if the actor should have realized that his conduct might cause harm to another in substantially the manner in which it is brought about, the harm is universally regarded as the legal consequence of the actor's negligence (Rest. of Torts, § 435, comm. b).

This court has applied that concept in reversing a trial court for discharging a defendant of liability for lack of proof of the proximate cause of the ignition of a fire while simultaneously finding that the defendant had negligently created the fire hazard.

> "The injury flowed directly from the negligent act. The result of the act is not incompatible with what one would expect. The question is not whether such an act would produce a conflagration in the majority of cases, but whether it has a decided and natural tendency to produce such a result." *The Santa Rita,* 176 Fed. 890, 895 (9th Cir. 1910).[4]

Prince v. Chehalis Sav. & Loan Ass'n., 186 Wash. 372, 58 P. 2d 290 (1936), aff'd En Banc, 186 Wash.

[4]The Honorable William Denman, of this court, was the attorney for the successful appellant.

377, 61 P. 2d 1374, adopted this universal rule in holding a defendant liable for the negligent creation of a fire hazard with knowledge of its danger to nearby property if fire should occur in it. Liability for creating such a hazard is not increased nor diminished by the fact that there is no proof of cause or precise place of the origin of the fire. *Ipso facto,* a plaintiff has no burden to prove that the fire arose at a particular point where combustibles were negligently accumulated nor does he lose his rights by showing the actual cause of the fire—whether accidental or the negligent act of another.

In *Johnson v. Kosmos Portland Cement Co.,* 64 F. 2d 193, 195 (6th Cir. 1933) the trial court had found that the defendant was negligent in creating a hazardous explosive condition but that such negligence was not the proximate cause of the explosion because it was touched off by lightning. The anomalous posture of the findings led the appeal court to reverse. It said, as must be said here:

> "It must be clear that the finding [of lack of proximate cause] is at least a mixed finding of law and fact, as to which no presumption of correctness obtains."

In a similar situation the Second Circuit bypassed attractive but sterile concept juggling — merely holding that

> "liability for the ensuing damage is clear, even if there is no proof of what ignited the [oil] slick." *The Edmond J. Moran, Inc. v. The Harold Remover,* 221 F. 2d 306, 208 (2nd Cir. 1955).

D. ***Subsequent due care does not terminate prior negligence.***

The trial court, finding no basis in the record for termination of the negligence short of liability, was forced into a legally erroneous application of the doctrine of proximate cause.

It is possible to argue that the court was led to this conclusion by fragmentizing the fire into its progress in time and space—a rule wholly contrary to the cases, texts and facts elsewhere found.

There was but one fire. It "originally started at a point on the right of way in Section 30 almost due south of a settlement known as Heckleville. This particular spot fire eventually grew into the conflagration which gives rise to this litigation . . ." (R. 175). It was largely brought under control within a 1,600-acre tract by August 10, 1951, but "continued to erupt . . . until the night of September 19-20" (R. 177-178). When a fire burns over 1,600 acres "it is a practical impossibility" to extinguish all smoldering fires (R. 198) although smaller fires can be completely extinguished, as were the six or seven other fires started by the PAW on August 6, 1951. On the night of September 19-20, 1951, a wind fanned these smoldering embers to life, carried them across the fire lines into the Fibreboard slash to the west[5]—from which it spread to Forks (R. 178).

It is clear from the findings that the negligence of defendants continued up to August 10, 1951, at least. What terminated it? Under the law neither temporary suppression of the fire, subsequent due care, lapse of time, nor an Act of God acting upon the negligently existing fire would terminate the negligence.

[5]This happened twice previously on September 13, 1951 but fortunately, during the day and early evening.

1. Subsequent due care does not terminate negligence.

> **"If the actor's negligent conduct is a substantial factor in bringing about harm to another, the fact that after the risk has been created by his negligence the actor has exercised reasonable care to prevent it from taking effect in harm does not prevent him from being liable for the harm (Rest. Torts, § 437).**

Illustration:

> "The X Railroad Company during a period of drought negligently sets fire to some underbrush and tree stumps on its right of way. Realizing the danger that the fire might spread to the adjacent timber land of B, the X Company orders its trackmen to put out the fire. They attempt to do so and reasonably believe that they have succeeded. A high wind not unusual in that locality at the time of the year springs up during the night. Some embers hidden in one of the stumps are fanned into flame, which spreads to B's land and consumes valuable timber. The X Company is liable for the destruction of B's timber."
>
> See *Jess v. McNamer,* 42 Wn. 2d 466, 255 P. 2d 902 (En Banc 1953).

It is clear that plaintiffs would have recovered if their homes had been destroyed on August 10, 1951, assuming the fire had not been temporarily brought under control on that date. It would also seem clear that if the two breakouts of September 13 had not luckily been contained, plaintiff's property would likewise have been destroyed—and there would be no basis in the findings to deny recovery.

> "The defendant's duty to exercise reasonable prudence to control the fire until it was extinguished or rendered harmless to his neighbor

was a continuing duty which was not discharged so long as the fire existed." *Hawkins v. Collins,* 89 Neb. 140, 131 N.W. 187 (1911).

"The sequence from the original fire to the burning of plaintiff's logs was interrupted by two apparent cessations of the fire, but the jury has found [as here the court has found] that the cessations were only apparent, leaving intervals of time in the visible progress of the fire, but making no real break at all in the actual connection." *Haverly v. State Line & S. R. Co.,* 135 Pa. St. 50, 19 A. 1013, 1014 (1890).

"There was but one fire—a fire which continued to burn until all the property was destroyed. It was arrested, but not extinguished. The fact that it was stayed for a time was not a new and independent cause. It was not an intervening agency, disconnected from the original negligence of the company. * * * The arrest of the flames for a time, however, did not start a new fire, nor furnish a new cause or force which destroyed the . . . property. It operated rather to diminish the destructive force of a fire which had been negligently started, and which had never been extinguished. There was continuity in the fire, and the fact that it should be partially subdued, and then fanned up and carried along by the wind, are not outside of the bounds of reasonable anticipation." *St. Louis & S. F. R. Co. v. League,* 71 Kan. 79, 80 Pac. 46, 47 (1905).

The danger of a fire spreading

"was the danger that appellant was bound to contemplate, to-wit: the natural and probable consequences of the original act, not the effect of the supposed extinguishment of the fire subsequently." *Lake Erie & W. R. Co. v. Kiser,* 25 Ind. App. 417, 58 N.E. 505, 507 (1900); *Anderson v. Minneapolis, St. & S. S. M. Ry. Co.,* 146 Minn. 430, 179 N.W. 45 (1920).

Where the negligence consists of the creating or maintenance of a fire hazard—fire damage thereby being foreseeable—it does not matter whether the damage is immediate or remote in determining proximate cause, *Theurer v. Condon,* 34 Wn. 2d 448, 461, 209 P.2d 311, 318 (1949).

Temporary suppression of a fire and communication of the fire after a lapse of time is insufficient under Washington law to break a chain of causations or to terminate negligence. *Wick v. Tacoma Eastern R. Co.,* 40 Wash. 408, 82 Pac. 711 (1905).

Burnett v. Newcomb, 126 Wash. 192, 217 Pac 1017 (1923) (fire thought to be extinguished on July 18, 1922, the day before wind fanned it to life).

Wood & Iverson, Inc. v. Northwest Lum. Co., 141 Wash. 534, 252 Pac. 98 (En Banc, 1927), (fire jumped over two miles and was burning in six places within 15 minutes on September 30, 1923).

Gailbraith v. Wheeler-Osgood Co., 123 Wash. 229, 212 Pac. 174 (1923), (slash fire believed by Fire Wardens to be in a safe condition).

Sommer v. Yakima Motor Coach Co., 174 Wash. 638, 26 P. 2d 92 (En Banc 1933) (fire extinguished several times).

Mensick v. Cascade Timber Co., 144 Wash. 528, 258 Pac. 323 (1927), (fire started September 18, 1924 and burned plaintiff's property on September 21, 1924 when wind velocities were recorded at 44 miles per hour).

Conrad v. Cascade Timber Co., 166 Wash. 369, 7 P. 2d 20 (1932) (fire went six miles in 24 hours).

Kuehn v. Dix, 42 Wash. 532, 85 Pac. 43 (1906), (damage on October 3, 1904 when a heavy wind spread a fire started a month before).

Sandberg v. Cavanaugh Timber Co., 95 Wash. 556, 164 Pac. 200 (En Blac 1917), (fire travelled about two miles over a three-day period).

Theurer v. Condon, 34 Wn. 2d 448, 460, 209 P. 2d 311 (1949), (fire occurred several years after creation of the fire hazard).

III. ***Wind acting upon a negligently-caused fire is not an intervening cause whether or not it reaches the proportions of an Act of God.***

In his opinion the court found it unnecessary to discuss the question of whether or not the wind that arose was "an Act of God as that term is meant in law" (R. 281), since he had already found that the pre-existing negligence had caused nothing. In Finding XVII, however, the court coupled with that finding the statement that:

> "The sole proximate cause of the damages to plaintiffs in the amounts stipulated herein was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951."[6]

All parties agree that the Heckleville fire was burning and smoldering on the night of September 19-20. All parties agree that a wind that night caused it to flare up and cross the fire lines as it had twice done six days earlier. All parties agree

[6]This falls far short of a finding that the weather conditions were extraordinary or unusual. In a large measure, wind and weather conditions at any particular time and place are always "fortuitous," and trained meteorologists forsee only a range of such conditions applicable over a wide area.

that the wind on the night of September 19-20, 1951, did not start any fire, but at most fanned it into renewed activity. The court refused to enter plaintiffs' proposed finding:

> "But for the fire which existed in the 1,600-acre area from August 10 to September 20, the fire would not have broken away on September 20 and plaintiff would not have suffered the stipulated damages to its property" (R. 220).

The only reason was that such facts were "so self-evident" that it would be "silly to make such a formal finding" (R. 258).

Wind causing a fire to spread does not ever appear to have been deemed an intervening cause in the Washington timber fire cases. It has been referred to in several instances, but in each case it was found that no antecedent negligence of the defendant had caused or contributed to the origin, spread or existence of the fire.

> ". . . all of the parties . . . did everything possible to extinguish or supress the spread of the fire from the time it was discovered . . ." *Walters v. Mason County Logging Co.,* 139 Wash. 265, 246 Pac. 749, 751 (1926).
>
> "There is no evidence to justify a finding of negligence on the part of the appellant." *Lehman v. Maryott & Spencer Logging Co.,* 108 Wash. 319, 322, 184 Pac. 323, 324 (1919).
>
> "He alleges that appellant . . . negligently and carelessly permitted the fire to escape from the immediate vicinity of the engine. The testimony wholly failed in these particulars." *Stephens v. Mutual Lumber Co.,* 103 Wash. 1, 8, 173 Pac. 1031 (1918).[7]

[7]In *Galbraith v. Wheeler-Osgood Co.,* 123 Wash. 229, 235, 212 Pac. 174, 176 (1923) the court pointed out that these cases merely held "that there was therein no evidence on which to base a finding of negligence." Repeated in *Mensik v. Cascade Timber Co.,* 144 Wash. 528, 258 Pac. 323 (1927).

The court found that negligence of the United States in the management of its lands and in failing to confine and suppress the fire proximately caused it to spread to the 1,600-acre area (R. 203). Hence its very existence on September 19-20 was the result of negligence. The wind was not found to have been an intervening Act of God and the court specifically held that it was unnecessary to decide that point (R. 180, 201, 281). The formal finding made thereafter that the wind was the sole proximate cause adds nothing except a verbal symmetry to the decision. It merely fills the void left when the court decided that the negligent occurrence, spread and existence of the fire had no consequences. The formal characterization of the wind as the "sole proximate cause" represents at best an unnecessary and legally irrelevant conclusion. For this reason, Appellant does not deem it necessary to argue at any length the merits of the court's conclusion that there was an "unforeseeable and fortuitous combination of wind and weather conditions."

Suffice it to say that the admitted facts and evidence clearly refute any claim that wind and weather conditions were unforeseeable in the sense that the danger of the fire coming to life as a result could not have been expected.

Like east winds and weather conditions concurred six days before and twice caused the fire to jump the fire lines.

Ranger Floe believed that a "wind at ten miles an hour could blow sparks out of the area" (Tr. 693) and that a 12- to 15-mile wind would carry sparks for a thousand feet (Tr. 742).

No weather station in the immediate area of the Heckleville fire, or anywhere else, recorded any wind or burning condition in excess of that forecast or significantly different from what had existed during the preceding several weeks or months (Tr. 2164-66, 2166, 2168, 2169, 2170). Equally or more severe easterly winds and low humidity had been recorded many times previously at nearby weather stations (Tr. 2175).

Six of the seven wind readings taken at the three Sol Duc valley weather reporting stations on September 20, 1951 were below the 16 miles per hour forecast (Tr. 2206-7).

The winds recorded on September 19 and 20, 1951 at the only nearby weather station having a long history of reports had been exceeded 54 times in previous years (Tr. 2218).

Weather recorded at Beaver would be the most representative of the wind at the fire area (Tr. 4183) and the maximum wind recorded there was 16 miles per hour on September 19-20 (Tr. 4184).

There was no wind recorded anywhere in excess of 25 miles an hour — winds Mr. Floe thought "would be more unusual but they could occur" (Tr. 716) during August and September in the Sol Duc Valley (Tr. 715).

Mr. Floe couldn't estimate the actual speed of the wind when he arose as 4:00 a.m. on the morning of September 20, but thought it "was *one* of the strongest winds" he had ever seen.

The Timber Sales Officer who had been stationed at Snider Ranger Station for 15 years (Tr. 1381) felt that there would be nothing unusual about

winds between 30 and 40 miles per hour in August and September (Tr. 1427).

Mr. Drake, fire suppression crew foreman at Snider Ranger Station (Tr. 1364) at first made no estimate of the speed of the wind when he observed the Heckleville fire from the road at 4:30 a.m. on Septemebr 20. He could only describe the wind as "fairly strong" (Tr. 1518). Subsequently he testified that in his opinion some gusts of wind might have reached as high as 25 to 30 miles per hour (Tr. 1626).

Others estimated the wind on the morning of September 20 at 10 miles per hour (Tr. 1666).

Any moderate wind would have blown a spark into the slash area. Once the slash was fired the fire would have gone in the direction of the wind. If the wind was as high as 25 miles per hour it would have only made the fire move a little faster but not have altered the final result (Tr. 2392-93).

At about 7:00 a.m. at a point ten miles from Heckleville (Tr. 3213) when the fire was in sight (Tr. 3211) on the top of an exposed ridge there was a wind estimated at 35 to 40 miles per hour (Tr. 3215). Some part of this wind at least was due to the heat of the fire (Tr. 3232) which would have created a draft up the ridge (Tr. 3228). The same witness had previously seen 35- to 40-mile-per-hour winds on the Olympic Peninsula in October (Tr. 3235) and would expect 20- to 25-mile-per-hour winds in August and September with occasional winds even stronger (Tr. 3237).

A State fire warden stationed at Gunderson Mountain testified by interrogatory that he esti-

mated the wind at his station at about 4:00 a.m. at 40 miles per hour (Tr. 3291). His boss said that he had no experience or training in wind measurement (Tr. 1727), a fact the witness confirmed (Tr. 3290) together with acknowledging that he was prejudiced against the plaintiff (Tr. 3292).

Another defense witness testified that winds were probably 25 miles per hour at elevations higher than Beaver (Tr. 4416) and were 10 or 16 miles per hour at low elevations (Tr. 4419).

Fibreboard's manager estimated the wind speed at the Heckleville fire on the morning of September 20 at 25 miles per hour (Tr. 4439) at an elevation of 2450 feet (Tr. 4475). A companion estimated the wind at 30 to 35 miles per hour at the same time and place (Tr. 4498). At that time there was fire burning right in front of them which was creating a certain amount of the wind (Tr. 4523).

In short, there was no evidence by anyone that the wind actually measured or observed was beyond the realm of expectation or even highly unusual at the time and place it occurred. Even then, the weather conditions at most merely accelerated the progress of the fire to Forks.

> "There is also testimony which accords with common knowledge, that fires themselves create a wind which increases as the fires increase; and that hills and draws act much the same as smoke stacks giving draft to the fire and velocity to the wind." *Mensik v. Cascade Timber Co.,* 144 Wash. 528, 534, 258 Pac. 323, 325-326 (1927).

Under the Restatement of Torts, such wind could not avoid liability.

> **An "intervening operation of a force of nature without which the other's harm would not have resulted from the actor's negligent conduct prevents the actor from being liable for the harm, if**
>
> **"(a) the operation of the force of nature is extraordinary, and**
>
> **"(b) the harm resulting from it is of a kind different from that, the liklelihood of which made the actor's conduct negligent." (§ 451).**

The court said:

> ". . . if the PAW engine had been defective and had negligently loosed the fire, or if the Forest Service in some manner had negligently loosed the fire in the first instance, I am quite well satisfied that the ultimate damage resulting to the plaintiffs in the case might be thought to be causally related to that original negligence" (R. 281).

Here then, is the nicest point of distinction. If the PAW had properly maintained its right of way, but through some malfunction of its engine started the Heckleville fire it would be liable. Where its negligence consisted of laying the tinder over a period of years and the spark was accidental, it is not liable. The course of events is the same. The foreseeable result is the same. The forest fuels were the same, the wind and weather conditions were unchanged, and the damage was identical. As a matter of law there is no distinction arising out of these two kinds of negligence. *Brady v. Waccamaw Lumber Co.,* 175 N.C. 704, 95 S.E. 483 (1918); *Chicago, St. L. & P. R. Co. v. Williams,* 131 Ind. 30, 30 N.E. 696 (1892); *Hardy v. Hines Bros Timber Co.,* 160 N.C. 113, 75 S.E. 855 (1912).

A. ***The "Doctrine" of proximate cause.***

Appellants

> "have declined to enter upon the wide field of investigation which would have opened up to us if we had attempted a critical review of the doctrine of proximate and remote cause, as it is discussed in cases without number, being admonished against the futility of such a course by the words of a wise judge, when discussing a similar question: 'It would be an unprofitable labor to enter upon an examination of the cases. If we could deduce from them the best possible expression of the rule, it would remain after all to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations. One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.' *Insurance Co. v. Tweed,* 7 Wall 44." *Hardy v. Hines Bros. Timber Co.,* 160 N.C. 113, 75 S.E. 855, 859 (1912); *The Santa Rita,* 176 Fed. 890, 895 (9th Cir. 1910).

Washington has embraced a like rule and has adopted the rule of the restatement. Where some damage is foreseeable from a defendant's negligence, all damages which follow in an unbroken sequence are the natural and proximate result of that negligence, whether or not the particular person injured and the manner of injury is foreseeable. *Lewis v. Scott,* 154 W. Dec. 509, 341 P. 2d 488 (1959).

Where there are consecutive independent acts by two persons, liability is imposed upon either or both if it "is a substantial factor in causing harm

to another," *Robillard v. Selah-Moxee Irrigation District,* 154 W. Dec. 709, 711, 343 P. 2d 565, 566 (1959), and "neither can interpose a defense that the prior or concurrent negligence of the other contributed to the injury." *Seibly v. Sunnyside,* 178 Wash. 632, 635, 35 P. 2d 56, 57 (1934); *Anderson v. McLaren,* 114 W. 33, 194 Pac. 828 (1921).

Hellan v. Supply Laundry Co., 94 W. 683, 689, 163 Pac. 9, 11 (1917). ("Appellant should not be permitted to fall between two stools through a mere juggling of terms.") *Schatter v. Berger,* 185 Wash. 375, 55 P. 2d 344 (En Banc 1936).

Here the Findings establish the defendants' negligence. If the combustible litter on the railroad right of way was a fire hazard how did it become less of a hazard by conversion into a vastly greater area of smoldering embers. The court believed that it was "self-evident" that the negligent acts would "contribute to starting the fire or its spread afterwards" (R. 268) and equally "self-evident" (R. 258) that "but for" the resulting fire "plaintiff[s] would not have suffered the stipulated damage" (R. 258). Yet the court said plaintiffs could not recover for failure to prove as a fact what he believed to be "self-evident."

The disaster that occurred was extensive indeed —although far from unprecedented. The trial court previously said:

> "In view of the vastness of the public domain and the tremendous properties owned by the Federal Government, state governments as well, I feel that whether logical or not, there is a distinction, or it will be held that there is a distinction which is perhaps a more literally correct statement of it, between the situation

of real property owned by the Government and real property owned by an individual" (R. 322, 486).

Congress has set at rest any consideration of public policy based upon the vastness of the public domain. The United States Supreme Court has refused to make that distinction favoring the Government at the expense of its citizens in this very case. *Rayonier v. United States,* 352 U. S. 315, 77 S. Ct. 374 (1957).

The fire cannot be fragmentized and an impossible burden of proof and conceptual distinctions between duty, foreseeability and legal causation applied to the fragments. A fair consideration of the danger in removing civil liability—for all practical purposes—for negligence tending to increase fire hazards, forbids application of any such devices. It does not promote the public safety to accumulate fire hazards and lackadaisically put out fires secure in the knowledge that the doctrine of proximate cause eliminates any enforcible duty to do so.

IV. ***Under Washington law the PAW is liable for damages resulting from the fire that originated upon and escaped from its right of way found to have been negligently maintained as a fire haazrd.***

The negligence found against the PAW has always been deemed sufficient grounds for recovery against railroads.

> "The engine may have been perfect in all its parts, the engineer may have been the best obtainable, and the operation of the engine mechanically correct; yet, if under such circumstances as here detailed, appellants permitted sparks or live coals to ignite the combustible

> material upon the right of way and thence to communicate itself to respondent's meadow, they must answer for the damage."[8] *Jordon v. Welch,* 61 Wash. 569, 572, 112 Pac. 656, 658 (1911).

See also *Abrams v. Seattle & Montana Rwy. Co.,* 27 Wash. 507, 68 Pac. 78 (1902);

Jordon v. Spokane, Portland & Seattle Ry. Co., 109 Wash. 476, 186 Pac. 875 (1920);

McCann v. Chicago, Milwaukee & Puget Sound R. Co., 91 Wash. 626, 158 Pac. 243 (1916);

Slaton v. Chicago, Milwaukee & St. Paul Railway Co., 97 Wash. 441, 166 Pac. 644 (1917).

The concurrent and subsequent negligence of the United States in failing to properly fight the fire and extinguish it could not constitute intervening negligence cutting off the liability for the Railroad's initial negligence.

The PAW not only failed to use any effective means to fight the fire the first day but unequivocaly refused to take any responsibility for controlling it as soon as it burned off its right of way (Tr. 87). No PAW crews worked on the fire between August 7 and September 20 (Tr. 199, 248). In fact, about the only action the PAW ever took to suppress the fire was to dump one load of water on a hot spot close to the tracks and to watch railroad bridges on the afternoon and evening of August 6 (Tr. 203-204, 232, 272, 318, 349).

No conduct could more clearly breach the Railroad's duty:

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[8]And must also answer for damages to the lands of another "burned in the same fire." 61 Wash. at p. 570, 112 Pac. 657.

> "An owner or occupant of forest land with knowledge of a fire burning on such land . . . must exercise ordinary and reasonable care to prevent spread of fire to the damage of others" (R. 179, supra, p. 21).

All of the points urged against the decision of the court exculpating the United States from its negligence apply with even greater force against the decision discharging the PAW of liability. While liability of a landowner is clear under Washington law, liability of a Railroad under the circumstances of this case is all but universal. A superficial analysis of Government land ownership might result in legal finicalism preserving the form but destroying the substance of legal liability for the supposed protection of the public welfare. Such a course has no justification at all insofar as the PAW is concerned. Events have proved that the public interest was grievously damaged by the negligence of the PAW.[9]

The "vastness of the public domain" (R. 486) is traversed by thousands of miles of railroads. A policy of legal immunity of the public domain from claims of innocent third parties would subject it to the real danger of destruction by fire through maintenance of fire hazards by these railroads. Indeed, in this very case, the United States could not recover its own loss for the same lack of legal "casual relationship between any negligence of PAW and the loss of Government timber" (R. 204) although damage was done to Government lands from the moment of ignition. Under the court's ruling the Government would appear foreclosed from even claiming its fire fighting costs for its initial attack

[9]The United States suffered losses far in excess of those of the plaintiffs.

upon the fire on August 6th. The United States should not enjoy nor suffer from any double standard depending upon whether or not it is a plaintiff or a defendant. Nor should a tort-feasor partake of any such supposed public policy depending upon whether or not the United States is joined as a party. The Tort Claims Act was intended to remove the shield of sovereign immunity not to extend it to prior and concurrent tort-feasors in any guise.

For all the reasons previously given for holding the Government liable and to afford the Government itself protection against the fire hazard of debris-littered railroads, the PAW should be held liable.

V. ***Fibreboard's negligence and violations of statute were a substantial factor in causing plaintiffs' damages.***

The court below summarily disposed of Fibreboard's liability upon two main grounds:

(a) For all acts and omissions prior to the September 20 breakout of the fire, it was not liable even if it knew of inadequate action taken against the fire upon its lands because it would not have

> "felt authorized or obliged to intervene and to interfere in any particular with the Forest Service supervision and control of the fire-fighting" (R. 189), and

(b) "Under the circumstances, indisputably shown by the evidence, finding of negligence on the part of Fibreboard in not disposing of the slash in the vicinity of the 1,600-acre tract . . . is not justified" (R. 189).

A. *Facts relating particularly to Fibreboard liability.*

The PAW locomotive stopped at Fibreboard Camp One at about 12:15 on August 6, 1951 (Tr. 313). A report of a fire was sent from that point at that time (Tr. 307). Ranger Floe called the Fibreboard timekeeper sometime prior to 1:00 p.m. (Tr. 535, 538) to get action from the train crew. The timekeeper, Mr. Stovall (Tr. 4502) died previous to the trial (Tr. 4503) and it was therefor impossible to determine precisely what then occurred.

In any event, he did not transmit the message nor inform Floe that the locomotive had broken down, probably because he was busy scaling logs (Tr. 4502). The loggers and truckdrivers going through the camp at that time (Tr. 324) were released by Fibreboard and went into town. In short, prior to 1:00 a.m. Fibreboard knew of the Heckleville fire, had men available but released them, although men could have walked a mile and a half down the tracks in about half an hour or 40 minutes (Tr. 358, 545).

Up to at least 1:35 p.m. the four-man train crew could have extinguished the fire (Tr. 537). Had Fibreboard dispatched the train crew or some of its own men they would have arrived at the Heckleville fire by that time and an hour before the Forest Service arrived. A prudent landowner, knowing of the unattended fire in the vicinity of Fibreboard slash would have taken instant action to suppress the fire (Tr. 3870). Fibreboard employees at Camp One knew of the fire, knew that Floe wanted to send back the PAW locomotive and knew or ought to have known that the locomotive had broken

down and knew or ought to have known of the existence of slash on adjacent Fibreboard land.

On August 7, 1951, the fire escaped the sixty-acre area first into slash on the Government's land (Tr. 3527) and then into Fibreboard slash (Tr. 2011-2012). The 1,600-acre area itself was practically all Fibreboard land (Tr. 891) that had previously been logged over (Tr. 4465). The fire spread through slash left from that operation (Tr. 4202). The fire was stopped mostly by green timber.

Slash is the debris left in the woods after logging. It is an abnormal concentration of fuel. When fire gets into slash it is nearly impossible to control because it burns with terrific heat, creates lots of convection currents and spreads sparks far ahead (Tr. 2675, 3468, 3789-3790, 4004, 4130-4131). Mr. Colville, in the Regional Forest Service branch in charge of slash burning and fire adviser to district rangers (Tr. 3990) had inspected the slash in the Sol Duc Valley with Mr. Floe in 1949 (Tr. 4131). At that time and with particular reference to the area where the Heckleville fire occurred (Tr. 4133) he pointed out that if there was a fire in that area it was going to be a big one (Tr. 4134). He even wrote a memorandum to that effect to his superiors (Tr. 4195).

When the 1,600-acre fire was temporarily subdued, the west fire line was immediately adjacent to at least three quarter-sections of slash created by Fibreboard in 1946 or 1947 (Tr. 1970, Ex. 112). Landing 1, just inside the perimeter of the 1,600-acre fire, had been logged at the same time. The breakout of September 20, 1954 was at Landing 1. When first seen in the early morning there was a

"wall of fire" in the slash (Tr. 1715) and there was fire around Landing 1 (Tr. 1707) but no fires or smoke visible elsewhere in the 1,600-acre burn (Tr. 1708, 1764, 1765, see infra p. 18).

Fibreboard had permitted this slash to accumulate because "we have made it a policy not to burn slash in general unless we are told to" (Tr. 4454).[10] If a landowner chose such a policy, Ranger Floe did nothing about it because:

> "If he wanted to carry that hazard, it was his" (Tr. 415).

Ranger Floe therefore did nothing about the slash although he had long regarded it as a fire hazard (Tr. 500-501). Fibreboard, although it knew of the breakout of September 13, 1959 (Tr. 2017) did nothing whatsoever to protect the slash from ignition by the adjacent 1,600-acre fire (Tr. 2024). The only reason suggested was that Fibreboard relied upon Fanger Floe and had offered to do what he asked. In at least three respects, however, Fibreboard did take action against the fire. During the early stages of the fire Fibreboard "just went out to put out the spot fires in that area" without regard to any chain of command (Tr. 2052). It thought it would be desirable to obtain access to the east side of the fire more directly from Camp One and therefore put in some access roads after talking to Floe (Tr. 2052). On September 20, 1951, after the breakout, Fiberboard sent its crew out to suppress spot fires with-

[10]At the trial some attempt was made to show that this particular slash hadn't been burned because of nearby snags on state land. Mr. Hartnagel, Fibreboard's logging manager (Tr. 4422) said that "The chances are we wouldn't have burned the slash in any event" (Tr. 4454). Weather conditions had permitted some slash burning in the area in each of the ten years preceding 1951 (Tr. 421, 422).

out waiting for or receiving any instructions to do so (Tr. 2034, 4456).

Argument and the court's finding that Fibreboard could not interfere with the Forest Service's management of the fire was essentially pointless. No one suggested it should be so. All of the evidence—and Fibreboard's conduct at the time—show that there were many things Fibreboard could have done without disrupting the fire organization in the slightest.

Thus it is sound practice, involving no possible hinderance to management of a fire to proceed immediately to the scene without awaiting arrival of the Forest Service (Tr. 2838, 4205, 4421) or to patrol it if the Forest Service is unable to do so for lack of funds, manpower or any other reason (Tr. 2871). The fire was burning, after all, on Fibreboard land, in proximity to Fibreboard slash and green timber. It would not have affected the fire organization one whit if Fibreboard had taken advantage of rainy days to work on the fire (Tr. 3694, 3695). Ranger Floe did nothing to keep Fibreboard from putting out the smoldering fires in Landing One and elsewhere in the 1,600-acre area or from patrolling or guarding the fire day or night (Tr. 949-950). Fibreboard, like any private owner of land affected by a fire could sit in on Forest Service meetings about fire tactics and strategy (Tr. 1360-1361).

The only possible consequence that anyone could think of that might militate against Fibreboard's taking action to suppress fire was the possible legal complications if something went wrong (Tr. 4208, 4450)—as indeed happened.

At the time, of course, the Forest Service and Fibreboard were negotiating as to costs of fighting the fire. Mr. Colville had, on August 9, 1951, observed Fibreboard slash in the 1,600-acre fire. He "saw red," when he learned that similar slash had burned and called for a conference with Fibreboard (Tr. 4202-4203). He demanded that Fibreboard pay the cost of fighting the fire. Fibreboard agreed on the spot it would pay its own costs in fighting the fire "pending determination" — the determination still being pending at the time of trial seven years later (Tr. 4203).

The delicate Alphonse-Gaston minuet followed—Fibreboard cooperating but doing little or nothing that might be construed as an admission of liability or result in more than minimal expense to it; the Government not requesting services sufficient to endanger the tentative settlement made on the spot. While this explains, it does not justify Fibreboard's studied abandonment of its duties as a landowner with a dangerous fire burning on its premises or the Forest Service's neglect of its duties to other property owners.

Doing nothing when action is demanded can constitute negligence. The testimony of Ranger Floe negatives any inference that action and precautions by Fibreboard would have interfered with the Forest Service. The fire was almost entirely upon Fibreboard lands from August 7 to August 10, during which period the action taken was negligent. Unless it appears that the Government would have refused aid or fire-fighting activities tendered by Fibreboard as the affected owner, then Fibreboard's failure to take action must likewise be actionable. *Thomas v. Casey,* 49 Wn. 2d 14, 297 P. 2d 614 (1956).

It is erroneous to dismiss Fibreboard from this action on the basis of the court's finding that Fibreboard was not authorized or obliged to interfere with the Forest Service's management of the fire. The court did not meet the issues of law established in the pre-trial order (R. 404, Para. 4). Fibreboard was under a clear duty to use reasonable care independent of the Forest Service.

State v. Gourly, 209 Ore. 363, 305 P. 2d 396 (En Banc 1956) held on the precise question that the duties of a landowner and a fire-fighting agency (a private association, supported by assessments) were independent and that each of them must make "every reasonable effort to control the fire" taking into account, of course, the acts of the others. Washington law is equally clear.

While a landowner should follow the directions of the state forester "it is always within his power to refuse to proceed if he thinks the forester's precautions inadequate and within his power to take precautions in addition to those prescribed by the forester." *Galbraith v. Wheeler - Osgood Co.,* 123 Wash. 229, 212 Pac. 174, 176 (1923). It is not due care for a private landowner to rely upon the fact that a slash fire "was started, directed and supervised by fire wardens of the state." *Wood & Iverson, Inc., v. Northwest Lum. Co.,* 141 Wash. 534, 208, 252 Pac. 98 (En Banc 1926).

In holding to the contrary, the court below clearly erred as a matter of fact from the record and as a matter of law under governing Washington law.

B. ***The evidence establishes that the slash accumulated by Fibreboard upon its lands was a hazard in fact and negligence per se under applicable Washington laws.***

There is apparently much dispute under current utilization practices, whether to burn logging refuse or to suffer the increased fire hazard over the time it takes for natural deterioration to dispose of the danger. In terms of forest management some foresters feel the added fire risk is justifiable considering the beneficial results in regrowth. No one, however, asserted that slash is not a major hazard.[11]

Washington law declares that land "covered wholly or in part by inflammable debris created by logging . . . shall constitute a fire hazard" (R.C.W. 76.04.370). A special statute governs the Olympic Peninsula, the area where this slash was created. That statute makes it "unlawful . . . to do or commit any act which shall expose any of the forest or timber upon such lands to the hazard of fire" (R.C.W. 76.04.450).

Prior to 1929, R.C.W. 76.04.370 declared slash to be a public nuisance. Maintenance of slash was therefore negligence *per se* giving rise to civil liability (R. 190).[12] *Great Northern Railway v. Oakley,* 135 Wash. 279, 237 Pac. 990 (1925). Upon its amendment and substitution of the term "fire hazard," with specific provision and remedies for abatement, it is possible to argue as did the court

[11]It is also true that there might be occasions when it is impossible to safely dispose of slash immediately. The Fibreboard slash here involved had been created four and five years earlier. During the ten years preceding 1951 weather conditions had permitted at least some slash burning in each year in the district (Tr. 421, 422). The decision not to dispose of it was one of policy.

[12]The court below pointed out that the question of law of absolute liability "has never been presented to the Washington Supreme Court." The liability in negligence for violation of the statute was, however, presented to and decided by the court in the *Oakley* case.

below that such a result no longer generally obtains under R.C.W. 76.04.370. It is not possible, however, to do so with respect to Olympic Peninsula lands. As to such lands the only change has been to convert slash from a "public nuisance" to an "unlawful . . . hazard of fire."

The rule of liability to be applied is not one of "liability without fault"[13] but the liability for conduct proscribed by staute. *Theurer v. Condon,* 34 Wn. 2d 448, 209 P. 2d 311 (1949); *Pig'n Whistle Corporation v. Scenic Photo Pub. Co.,* 57 F. 2d 854 (9th Cir. 1932).

Washington has long adhered to the rule that a civil cause of action may arise from a Washington statute criminal in form,[14] a ruling which this court applied to sustain a recovery by the United States for fire damage done to its timber. *Spokane International Ry. Company v. United States,* 72 F. 2d 440 (9th Cir. 1934).

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[13]Appellants did not contend that the statutes impose "liability without fault" but did contend that the statutes impose standards of care, the violation of which is negligence *per se.* Both statutes cited have an obvious factual basis in the danger to be apprehended from slash. The record abundantly supports the danger of slash as a matter of fact and the possibility of disposing of it. The defendant did not here seek to prove that it could not have disposed of the slash—only that its policy was wiser than the standard established by law. In *State v. Canyon Lumber Corporation,* 46 Wn. 2d 701, 284 P. 2d 316 (1955), the Washington Supreme Court held that the question of whether or not R.C.W. 76.04.370 imposed liability without fault should await a case requiring such a determination. Where, as here, the defendant created the hazard, deliberately suffered it to remain on his premises and had notice of the slash and time to dispose of it, the question of liability without fault is not raised.

[14]Most recently in *Browning v. Slenderella Systems of Seattle,* 154 W. Dec. 586, 341 P. 2d 882 (1959 En Banc).

The wisdom of slash disposal was not and could not be relevant in this action. If it is wiser to suffer the hazard of fire while it deteriorates slowly, the legislature might be persuaded to change the law. One might as easily contend that a drunken driver failing to yield the right of way at an intersection in the early hours of January 1 was not negligent because many other New Year's Eve celebrants were equally drunk and the posted right of way route unduly restricted the flow of traffic.

Fibreboard conceded in the pre-trial order that

> "The purpose of burning logging debris is to decrease the risk of spread of fire . . ." (R. 400).

That is the reason and purpose of the statutes declaring slash a fire hazard and prohibiting maintenance of a fire hazard upon the Olympic Peninsula. It may be true, as contended by Fibreboard, that it is:

> "common practice among timber owners and operators not to burn logging debris unless it presents an unusually hazardous situation and unless required to do so by the State Fire Warden or Federal Forest Ranger" (R. 400).[15]

It cannot be contended, however, that common negligence is any the less actionable. Accepting its contention as fact, only proves that Fibreboard has and will continue to assume the risk of spread of fire as a matter of policy. The deliberate choice of risk is no less negligent than the inadvertent creation of one. It is difficult to see why Fibreboard will ever go to the expense of burning slash now that its policy has received the law's stamp of approval.

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[15]The failure of Ranger Floe to give such notice could not excuse non-compliance with the law. *Pig'n Whistle Corporation v. Scenic Photo Pub. Co.,* 57 F. 2d 854 (9th Cir. 1932).

Under Washington law:

> "An owner or occupant of forest land with knowledge of a fire burning on such land, even though started by strangers must exercise ordinary and reasonable care to prevent spread of the fire to the damage of others. Failure to do so is negligence rendering the landower or occupant liable for all damages proximately resulting therefrom" (R. 179).

Here Fibreboard knew of the fire burning on its lands, yet took no care of it. It knew of the fire hazard it had created and chose to continue it. That slash contributed to the spread of the fire to 1,600 acres and to its final breakout. The fire spread directly from its lands to the land of the plaintiff.

Whether or not Fibreboard "felt authorized or obliged to intervene and to interfere . . . with the Forest Service" is immaterial. Its duty was imposed by law. Under the evidence it was authorized and the Forest Service would have welcomed all of the mop-up and patrolling Fibreboard could have supplied—if only to relieve itself of expense.

CONCLUSION

The catastrophe that damaged plaintiffs was inexcusable. The court has found negligence before, at, and after its inception. No legal semantics outweigh the overwhelming evidence and factual findings that the disaster was man-made and avoidable. No useful purpose is served by promulgating or approving a *ratio decidendi* as removed from reality as the decision below. Great damage is done to the fabric of the law when it is cut to clothe a particular case.

Upon the findings of fact the judgment below should be reversed as to the United States and PAW and on the preponderance of the evidence and the law of the State of Washington the judgment should be reversed as to defendant Fibreboard and plaintiffs awarded the damages caused them by defendants' negligence.

DATED at Seattle, Washington, this 7th day of December, 1959.

FERGUSON & BURDELL
W. H. Ferguson,
Donald McL. Davidson,
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APPENDIX A

Portions Of Findings Of Fact and Conclusions Of Law Specified As Error

Findings of Fact

Finding XII

". . . an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred, causing a flareup of fire inside the 1600-acre area, . . . "

Finding XIII

". . . However it has not been established by a preponderance of the evidence that such failure to exercise ordinary care proximately caused or contributed to the start or subsequent spread of the Heckleville fire." (R. 234)

Finding XIV

"It is not shown by a preponderance of the evidence that PAW failed to use ordinary care in any particular alleged herein other than as stated above in Finding No. XIII." (R. 234)

Finding XV

"Plaintiffs did not show by a preponderance of the evidence that defendant Fibreboard failed to use ordinary care in any of the particulars of negligence alleged by plaintiffs." (R. 234)

Finding XVI

". . . Whether or at what time and place, the fire might have been contained or suppressed within said area but for such negligence is a matter of speculation and cannot be determined as a reasonable probability under the evidence. It has not been established by a preponderance of the evidence that had such

negligence not existed, the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area." (R. 235)

Finding XVII

"Plaintiffs did not show by a preponderance of the evidence that defendant United States failed to use reasonable care in mop-up or other firefighting activities after August 7, or in any other particular alleged by plaintiffs, except as found in Findings No. XIII and XVI above." (R. 235)

Finding XVIII

"Plaintiffs and . . . United States of America . . . have failed to sustain the burden of proving by a preponderance of the evidence that any of the damages claimed were proximately caused or contributed to by any negligence on the part of defendant herein. The sole proximate cause of the damages to plaintiffs in the amounts stipulated herein was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951." (R. 235-236)

Conclusions of Law

Conclusion III

". . . The negligence of either defendant did not proximately cause or contribute to causing either the start or the spread of the Heckleville fire, and in no way is a proximate cause of plaintiffs' damages." (R. 236)

Conclusion V

"No negligence of any defendant hereby proximately caused or contributed to any of the damages claimed by plaintiffs." (R. 237)

Conclusion VI

"Plaintiffs' actions should be dismissed with prejudice and with costs to the prevailing parties." (R. 237)

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In summary, Findings XIII, XVI and XVIII and Conclusions III and V all relate to proximate cause. Findings XII, XIV, XV, and XVII, by reference to the Court's memorandum decision, incorporated in the findings, also relate to the issue of causation, since the Court failed to consider numerous claimed acts of negligence and in the end dismissed those discussed because:

"if negligence be assumed in any particular charged, causal relationship between such negligence and the breakout and spread of the fire on the early morning of September 20 is a matter of speculation and conjecture and not shown as a reasonable probability." (R. 200-201)

APPENDIX B

Witness Index To Typewritten Transcript Of Testimony

APPENDIX B

EXHIBITS INDEX TO TYPEWRITTEN TRANSCRIPT OF TESTIMONY

One hundred eighty-two exhibits were numbered by the District Court Clerk at the trial and all of them are included in the record on appeal to be submitted to this Court. As many of these exhibits as may be so accommodated will be transmitted to this court in accordion style compartmented file jackets, each numbered compartment of which will enclose the exhibit with the corresponding number. Exhibits so filed will not be described herein except by number. Exhibits such as rolled aerial photographs and maps which cannot be accommodated in file jackets may be difficult to identify. Therefore, they will be described in this appendix in the same terms as used in the pretrial order. Exhibits as to damages, included in the record but not offered because of the intervening stipulation as to damages, will be so designated to distinguish them from exhibits pertaining to liability.

Exhibit No.	Description	Identified	Offered	Rejected	Received
1		II- 365 R 4	II- 365		II- 365
2		II- 365 R 4	II- 365		II- 365
3		II- 365 R 5	II- 365		II- 365
4		II- 365 R 6	II- 365		II- 365
5		II- 365 R 6	II- 365		II- 365

Exhibit No.	Description	Identified	Offered	Rejected	Received
6		II- 365 R 6	II- 365		II- 365
7		II- 365 R 7	II- 365		II- 365
8		II- 365 R 8	II- 365		II- 365
9		II- 365 R 9	II- 365		II- 365
10		I- 137 I- 139 III- 967 R 8	I-138 III- 967		I- 140 III- 967
11		I- 137 I- 139 III- 967 R 8	I- 139 III- 967		I- 140 III- 967
12		II- 385 R 9	II- 386		II- 386
13		II- 388 R 9	II- 389		II- 390

Exhibit No.	Description	Identified	Offered	Rejected	Received
14		II- 423 R 9	II- 425		II- 426
15		II- 460 R 10	II- 461		II- 461
16		II- 461 R 10	II- 461		II- 461
17		II- 461 R 10	II- 462		II- 462
18		II- 462 R 10 R 11	II- 462		II- 462
19		I- 41 R 11	I- 44		I- 44
20		I- 39 R 11	I- 40		I- 40
21		I- 41 R 11	I- 41		I- 41
22		I- 46 R 11	I- 48		I- 49

Exhibit No.	Description	Identified	Offered	Rejected	Received
23		I- 48 R 11	I- 50		I- 50
24		II- 401 R 12	II- 401		II- 401
25		R 12	N.O.*See Ex. 80		
26		II- 667 R 13 R 17	II- 667		II- 671
27		I- 58 R 13	I- 58		I- 59
28		III- 967 R 13	III- 967		III- 968
29		II- 501 R 14	II- 501		II- 502
30		II- 509 R 14	II- 509		II- 509

*Not Offered

Exhibit No. Description Identified Offered Rejected Received

*Not offered

Exhibit No.	Description	Identified	Offered	Rejected	Received
31		II- 509 R 14	II- 509		II- 509
32		II- 509 R 14	II- 509		II- 509
33		II- 509 R 14	II- 509		II- 509
34		II- 509 R 14	II- 509		II- 509
35		II- 509 R 14	II- 509		II- 509
36		II- 509 R 14	II- 509		II- 509
36-A		VII-2154	VII-2156		VII-2159
37		III- 968 R 15	III- 968		III- 968
38		III- 968 R 15	III- 968		III- 968
39		III- 968 R 15	III- 968		III- 968

Exhibit No.	Description	Identified	Offered	Rejected	Received
40		I- 60 R 15	I- 60		I- 60
41		I- 60 R 15	I- 60		I- 60
42		I- 60 R 15	I- 60		I- 60
43		I- 60 R 15	I- 60		I- 60
44		I- 61 R 15	I- 61		I- 61
45		III- 830 R 17	III- 831		III- 831
46		III- 996 R 17	III- 996		III- 996
47		II- 682 R 17	II- 682		II-683
48		II- 674 R 18	II- 673		II- 676

Exhibit No.	Description	Identified	Offered	Rejected	Received
49		III- 968 R 18	III- 968		III- 968
50	Damages	R 21	XIV-4596		
51	"	XIV-4572 R 21	XIV-4596		XIV-4597
52	"	XIV-4570 R 21	XIV-4596		XIV-4597
53	"	XIV-4570 R 21	XIV-4596		XIV-4597
54	"	R 21	N.O.		
55	"	R 21	N.O.		
56		R 22	N.O.		
57		R 22	N.O.		
58		R 23	N.O.		
59		R 23	N.O.		
60		III- 969	III- 968 III- 969		III- 970

Exhibit No.	Description	Identified	Offered	Rejected	Received
61		III-1003	III-1003		III-1003
62		IV-1214	IV-1214		IV-1214
63			NO.O.		
64		III- 970	III- 970		III- 970
65		II- 672 III- 971	II- 673 III- 970 III- 971		III- 973
66		II- 612 IV-1093	II- 613 IV-1094		II- 613 IV-1094
67		III- 973	III- 973		III- 973
68		III- 996	III- 996		III- 996
69		III- 996	III- 996		III- 996
70			N.O.		
71			N.O.		
72		V-1578	V-1578		V-1578
73		II- 522	II- 522		II- 522
74		II- 660 X-3261	II- 660 X-3261		II- 662 X-3263

Exhibit No.	Description	Identified	Offered	Rejected	Received
74		II- 660 X-3261	II- 660 X-3261		II- 662 X-3262
75		III- 973	III- 973		III- 974
76		V-1578	V-1578		V-1578
77		III- 817	III- 817		III- 817
78			N.O.		
79			N.O.		
80		II- 372	II- 373		II- 373
81		IV-1280	IV-1281		IV-1283
82		III- 974	III- 974		
83		III- 974	III- 974		III- 974
84		V-1269	IV-1270		
85		VII-2269	VII-2269		VII-2269
86		X-3262	X-3262		X-3264
87			N.O.		
88		III- 975	III- 975		III- 975

Exhibit No.	Description	Identified	Offered	Rejected	Received
89		X-3264	III- 975 X-3264		X-3264
90		X-3264	X-3264		X-3264
Govt. 91	Damages		N.O.		
Govt. 92	"		N.O.		
Govt. 93	"		N.O.		
Govt. 94	"		N.O.		
Govt. 95	"		N.O.		
Govt. 96	"		N.O.		
Govt. 97	"		N.O.		
Govt. 98	"		N.O.		
Govt. 99	"		N.O.		
Govt. 100	"		N.O.		
Govt. 101		II- 369	II- 368		II- 371
Govt. 102		II- 369	II- 368		II- 371
Govt. 103			N.O.		
Govt. 104		VII-2225	VII-2225		VII-2226

Exhibit No.	Description	Identified	Offered	Rejected	Received
Govt. 104		VII-2225	VII-2225		VII-2226
Govt. 105			N.O.		
Govt. 106		II- 525	II- 55		II- 525
Govt. 107		XIV-4617	XIV-4617		XIV-4617
Govt. 108	Composite United States Geological Survey Map of Western Clallam County and environs on which there is traced the general outline of the entire burn area.	III- 952	III- 952		III- 952
Govt. 109	Map of the northwestern corner of the State of Washington prepared by the Forest Service in 1933.		N.O.		
Govt. 110	Vanorsdel map--a tracing of the area near the point of origin of the fire, including portions of Sections 29, 30, 31 and 32, Township 30 North, Range 10 West W.M.	III- 975	III- 975		

Exhibit No.	Description	Identified	Offered	Rejected	Received
111	Vanorsdel map entitled "Origin of Fire, August 6 and 7, 1951." Field surveys made by R. W. Ensley and G. E. Lahti on March 26-30, 1953 and May 11-15, 1953; prepared under the direction of John P. Vanorsdel, Consulting Engineer. This map shows portions of Sections 29 and 30, Township 30 North, Range 10 West. It indicates the main line of the Port Angeles Western Railroad, the old railroad grade, areas of burned reproduction and slash, unburned reproduction and slash-burned sapling timber. The fire boundaries, type boundaries, cat fire trail, hand fire trail, Camp Creek and certain monuments are indicated. The	II- 577	II- 578		II- 579

Exhibit No.	Description	Identified	Offered	Rejected	Received
	uments are indicated. The scale of the map is 1" equals 100'. Map shows contours at intervals of 25 feet.				
112	Vanorsdel map entitled "1600-acre Fire Map." Field surveys made by R. W. Ensley and G. E. Lahti on March 26-30, 1953 and May 11-15, 1953; prepared under the direction of John P. Vanorsdel. This map shows Sections 26 to 35, Township 30 North, Range 10 West and identifies the location of landings, logging truck roads, the boundary of the original fire in the 1600-acre area, the subdivision in the 1600-acre area, cat fire trails, type boundaries, areas of green timber, unburned reproduc-	I- 27	I- 27		I- 27

Exhibit No.	Description	Identified	Offered	Rejected	Received
	tion, burned reproduction and slash-burned and sapling timber. It shows the area of the original fire, that is, the fire within the 1600-acre area, and areas covered by clearance certificate. It identifies the location of the old railroad grade, the Port Angeles western main line, the Olympic Highway, Heckleville, the Soleduck River and Camp Creek.				
112-A	Fibreboard overlay to Ex. 112	VII-2246	VII-2246		VII-2247
113	Vanorsdel map entitled "Vicinity Bap of Landing No. 1." Field surveys made by R. W. Ensley and G. E. Lahti on March 26-30, 1953 and May 11-15, 1953; pre-	III- 849	III- 849		III- 851

Exhibit No.	Description	Identified	Offered	Rejected	Received
	pared under the direction of John P. Vanorsdel. This map shows the truck road, the old Cat road, Cat fire trail, the pit Cat road, fire boundary, landing debris boundary, the No. 1 spar tree stump, area of unburned reproduction, the burned area, the gravelp it and the landing. The scale of the map is 1" equals 30'. Contours are shown at intervals of 5 feet.				
114	Vanorsdel map enttiled "Vicinity Map of Landing No. 2." Field surveys made by R. W. Ensley and G. E. Lahti; prepared under the direction of John P. Vanorsdel on March 26-30, 1953, and May 11-15, 1953. This map shows truck roads,	III- 976	III- 976		III- 976

Exhibit No.	Description	Identified	Offered	Rejected	Received
	Cat fire trail, old Cat road, burned area, debris boundary and landing. The is scaled to 1" equals 3' and shows contours at intervals of 5 feet.				
115		X-3263	X-3263		X-3264
116		III- 815	III- 815		III- 815
117		III- 977	III- 977		III- 977
118		II- 685 II- 688	II- 690		II- 690
119		II- 689	II- 690		II- 690
120		II- 686 II- 689	II- 690		II- 690
121		II- 686 II- 689	II- 690		II- 690
122		II- 686 II- 689	II- 690		II- 690
123		II- 686	II- 690		II- 690
124		II- 686 II- 689	II- 690		II- 690

Exhibit No.		Description	Identified	Offered	Rejected	Received
	124		II- 686 II- 689	II- 690		II- 690
	125	Same as No. 46			X-3266	
	126	Same as No. 45			X-3266	
Ray.	127	An aerial photo-mosaic produced by Carl M. Berry, South Administration Building, Box 38, Boeing Field, Seattle 8, Washington, showing the entire Forks Fire burn area. (Admitted in evidence as Plaintiff's Exbibit "C" on February 27, 1954.)	III- 799	III- 800		III- 800
Ray.	128	An aerial photo-mosaic of the 1600-acre area dated October 7, 1951, produced by Carl M. Berry, South Administration Building, Box 38, Boeing Field, Seattle 8, Washington,	III- 798	III- 799		III- 799

Exhibit No.	Description	Identified	Offered	Rejected	Received
	identified on its reverse side by Reorder No. M-53-21. (Admitted as plaintiff's Exhibit "D" on February 27, 1954.)				
Ray. 129	An aerial photo-mosaic entitled "Calawah Fire Area," produced by Carl M. Berry, South Administration Building, Box 38, Boeing Field, Seattle 8, Washington, from aerial photography flown November 1946 by Delano Aerial Surveys of Portland, Oregon.	III- 965	III- 966		III- 966
Ray. 130	A Carl Berry Photo-mosaic of the PAW right of way and of Highway 101 in the vicinity of the point of origin of the fire on August 6, 1957, identified on the reverse side by Reorder No. C-57-9.	II- 449	II- 449		II- 449
Ray. 131	A Carl Berry aerial photo-	III-1031	III-1032		III-1032

order No. C-57-9.

Exhibit No.	Description	Identified	Offered	Rejected	Received
Ray. 131	A Carl Berry aerial photo-mosaic of the PAW right of way and of Highway 101 in the vicinity of the point of origin of the fire on August 6, 1951, identified on its reverse side by Reorder No. C-57-9.	III-1031	III-1032		III-1032
Ray. 132	A Carl Berry aerial photo-mosaic of the PAW right of way and of Highway 101 in the vicinity of the point of origin of the fire on August 6, 1951, identified on its reverse side by Reorder No. C-57-9. Rayonier has multiple copies of this aerial photo-mosaic and proposes to use one of said copies for each witness who may find it appropriate to mark locations of hte fire and	I- 206	I- 207		I- 207

Exhibit No.	Description	Identified	Offered	Rejected	Received
	the fire lines, etc. at various times.				
Ray. 132-A	Carl Berry aerial photo-mosiac of the PAW right of way and of Highway 101 in the vicinity of the point of origin of the fire on August 6, 1951, identified on its reverse side by re-order No. C-57-9. This photograph bears date of October 7, 1951 and is of the scale of 1 inch equals 400 feet. Mr. Floe has marked this photograph so as to show the 1938 fire, the Rifle Fire of June-July 1951 and the 1600-acre fire.	II- 451	II- 475		II- 475
Ray. 133	A Carl Berry aerial photo-mosaic of the so-called 60-acre area, scale 1"		N.O.		

Exhibit No.		Description	Identified	Offered	Rejected	Received
		equals 200'. Identified on its reserve side by re-order No. C-57-9.				
Ray.	134	General map of the Forks Fire burn area and vicinity, bearing initials "J.E.F." and dated June 30, 1953, showing outline of the burn area, location of Snider Ranger Station and other sites referred to in the pretrial order, the location of Raynoier's fee lands and the type of timber thereon, status of clearance, location of felled and bucked timber, etc.	VI-1886	VI-1887 XIII-4305		VI-1888 XIII-4306
Ray.	135	Reproduction Survey map 1948 and 1950, showing species, age, stocking and acreage of so much of	XIII-4305 XIV-4596	XIII-4305 XIV-4596		XIII-4306 XIV-4597

Exhibit No.	Description	Identified	Offered	Rejected	Received
	Rayonier's lands identified in Rayonier's Exhibit 50 as are located in Township 29 North, Range 13 West, W. M.				
Ray. 136	Reproduction Survey map 1948 and 1950, showing species, age, stocking and acreage of so much of Rayonier's lands identified in Rayonier's Exhibit 50 as are located in Township 29 North, Range 12 West, W.M.	XIII-4305 XIV-4568	XIII-4305 XIV-4596		XIII-4306 XIV-4597
Ray. 137	Reproduction Survey map 1948 and 1950, showing species, age, stocking and acreage of so much of Rayonier's lands identified in Rayonier's Exhibit 50 as are located in Township 29 North, Range 11 West, W.M.	XIII-4305 XIV-4568	XIII-4305 XIV-4596		XIII-4306 XIV-4597

North, Range 11 West, W.M.

Exhibit No.		Description	Identified	Offered	Rejected	Received
Ray.	138	Reproduction Survey map 1948 and 1950, showing species, age, stocking and acreage of so much of Rayonier's lands identified in Rayonier's Exhibit 50 as are located in Township 28 North, Range 13 West, W.M.	XIII-4305 XIV-4596	XIII-4305 XIV-4596		XIII-4306 XIV-4597
Ray.	139			N.O.		
Ray.	140		III- 788	III- 788		III- 788
Ray.	141		X-3267	X-3267		X-3267
Ray.	142	Damages		N.O.		
Ray.	143-A) -B) -C)		XIII-4316	XIII-4316		XIII-4317
Ray.	144	Damages		N.O.		
Ray.	145	Damages		N.O.		
	146		I- 175	I- 178		I- 178
	147		II- 428	II- 428		

Exhibit No.	Description	Identified	Offered	Rejected	Received
148	Government's slash map of the burn area corrected to show changes requested by other parties.	II- 487	III- 977		III- 979
149	A map of portions of the Northwest Quarter of the Southeast Quarter and the Northeast Quarter of the Southwest Quarter of Section 29, Township 30 North, Range 10 West, showing standing and down forest materials purporting to be similar to the fuel types at the toe of Camp Creek ridge in the 60-arce area. This map made in October 1957.	III- 836 IV-1297	III- 839 IV-1297		IV-1298
149-A		III- 836 IV-1297	III- 839 III- 844 IV-1297		IV-1298
150		III- 778	III- 778		III- 778

Exhibit No.	Description	Identified	Offered	Rejected	Received
151		III- 783	III- 784		
152		XIV-4617	XIV-4617		XIV-4617
153		III- 789 III- 790 XIV-4618	III- 789 XIV-4617		III- 879
154	Damages		N.O.		
155			N.O.		
156		X-3268	X-3268	X-3268	
157		X-3268	X-3268	X-3268	
158		IV-1082	IV-1082 IV-1083		IV-1083
159	Very large brown paper map entitled "P.A.W. Fire, 1951," showing Township 30 North, Range 10 West of the Willamette Meridian and purporting to identify by symbols and colored lines the location of and the characteristics of the fire		N.O.		

Exhibit No.	Description	Identified	Offered	Rejected	Received
	lines within the above-described township.				
160	Very large brown paper map entitled "P.A.W. Fire, 1951," showing a large portion of the area within the Forest Service Protective Area which was burned on and after September 20, 1951, and purporting to identify by symbols and colored lines the location of and the characteristics of the fire lines within trat area.		N.O.		
161			N.O.		
162		V-1459	V-1460		V-1460
163		IV-1301	IV-1302		IV-1303
164		V-1573	V-1573		V-1574
165		V-1678	V-1678		V-1679

Exhibit No. Description Identified Offered Rejected Received

Exhibit No.	Description	Identified	Offered	Rejected	Received
166		V-1682	V-1683		V-1683
167		X-3269	X-3269		X-3269
168		VII-2178 X-3269	VII-2179 X-3269		VII-2180 X-3269
168-A		VII-2178 X-3269	VII-2179 X-3269		VII-2180 X-3269
169		X-3269	X-2174		X-3279
170		X-3270	X-3269		
170-A	(See X-3274-80)			X-3280	
171		VII-2251	VII-2257		VII-2257
172		X-3108	X-3108	X-3109	
173		X-3350	X-3350		X-3350
174		X-3350	X-3350		X-3350
175		X-3372	X-3372		X-3372
176		X-3388	X-3388		X-3389
177		XI-3562	XI-3562 XII-3742		XI-3563 XII-3743

Exhibit No.	Description	Identified	Offered	Rejected	Received
178-A	Simpson LoggingCompany calendar. (A scene on Simpson's logging railroad in South Olympic Mountain area, Grays Harbor County.	XII-3746 XII-3747	XII-3745 XII-3803-4		XII-3804
178-B		XII-3746- XII-3747	XII-3745 XII-3806		XII-3806
178-C		XII-3746- XII-3747	XII-3745 XII-3806		XII-3806
179		XIV-4428	XIV-4428		XIV-4428
180		XIV-4562	XIV-4563		XIV-4563
181		XIV-4595	XIV-4596		XIV-4595
182		XIV-4563	XIV-4564		XIV-4565

PAW EXHIBITS

		Transcript Offered		Received	
1		I	131	I	131
		I	171	I	171
2		I	168	I	168
3		I	202	I	202
4		I	202	I	202
5		I	67	I	67
7		I	171	I	171
8		I	171	I	171
9		XIV	4598	XIV	4598
10		XIV	4598	XIV	4598
11		XIV	4599	XIV	4599

FIBREBOARD EXHIBITS

		Transcript Offered		Received	
1		II	484	II	484
2		VI	2014	VI	2014
3		X	3273	X	3274
4		XIV	4428	XIV	4429
5		X	3274	X	3274
6		VII	2287	VII	2287
7	REJECTED	X	3295	X	3296
		XIV	4536	XIV	4536
8		XIV	4489	XIV	4490

Nos. 16367 and 16368

In the United States Court of Appeals for the Ninth Circuit

ARTHUR A. ARNHOLD, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

RAYONIER INCORPORATED, A CORPORATION, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLEE UNITED STATES

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In the United States Court of Appeals for the Ninth Circuit

Nos. 16,367 and 16,368

ARTHUR A. ARNHOLD, ET AL., APPELLANTS,

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

RAYONIER INCORPORATED, A CORPORATION, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLEE UNITED STATES

JURISDICTIONAL STATEMENT

These actions were brought by appellants against the United States under the Federal Tort Claims Act to recover damages for property losses allegedly sustained by reason of the negligence of Government employees. The jurisdiction of the United States District Court for the Western District of Washington, Northern Division, was invoked under 28 U.S.C. 1346(b). On March 1, 1954, the district court dismissed the

complaints with prejudice. On September 1, 1955, this Court affirmed. *Rayonier Incorporated* v. *United States,* 225 F. 2d 642; *Arnhold, et al.* v. *United States,* 225 F. 2d 650. On January 28, 1957, the Supreme Court vacated the judgments of this Court and remanded the cases to the district court for trial. *Rayonier Incorporated* v. *United States,* 352 U.S. 315.

On June 23, 1958, following the conclusion of trial, the district court filed a memorandum opinion (R. 171-205). On July 1, 1958, the court filed findings of fact and conclusions of law (R. 205-215). On July 10 1958, judgment was entered dismissing the actions with prejudice (R. 215-217).

On July 18, 1958, the appellants in each action filed motions to amend the findings of fact, conclusions of law and judgment (R. 219-224, 473-479). On September 15, 1958, the district court filed amended findings of fact and conclusions of law (R. 227-237). On September 16, 1958, the court entered an order amending its previously filed memorandum opinion (R. 238-241).

On September 18, 1958, notice of appeal was filed by appellant Rayonier (R. 295-296). On the following day, notice of appeal was filed by appellants Arnhold, et al. (R. 479-481). The jurisdiction of this Court rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

These actions were brought against the United States to recover damages for property loss sustained by the appellants in a forest fire on the Olympic Peninsula in the State of Washington. The cases were consolidated for trial. These appeals are from the joint judg-

ment of the district court dismissing the actions.[1] This judgment was based on the determination of the district court, following an extensive trial at which the testimony of thirty-two witnesses was taken in approximately 4600 pages of transcript, that the damage to appellants' property was not proximately caused by the negligence of Government employees.

We set forth below (1) the prior history of this litigation; (2) the salient facts as reflected by the record; and (3) illustrative examples of statements contained in the appellants' briefs which we believe to be unsupported by the record or based on material taken out of context.

1. *The prior history of the litigation.* In broad outline, the complaints which were before this Court on the prior appeals[2] alleged that the forest fire had been started on August 6, 1951 by sparks from a Port Angeles Western Railroad (P.A.W.) train which was proceeding on its right-of-way across the Olympic National Forest. It was asserted that the Forest Service of the Department of Agriculture undertook to fight the fire, which spread first to a 60-acre tract and then to a 1600-acre tract. The fire was allegedly

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[1] In the *Arnhold* case, suit was brought additionally against the Port Angeles Western Railroad and Fibreboard Products, Inc., based upon diversity of citizenship. The district court dismissed the *Arnhold* complaint against these defendants as well as the United States and this dismissal is encompassed in the *Arnhold* appeal.

The district court also dismissed a cross-claim and counterclaim filed by the United States against the Railroad and appellant Rayonier respectively. The United States has not taken an appeal from this dismissal.

[2] *Rayonier Incorporated* v. *United States*, 225 F. 2d 642; *Arnhold, et al.* v. *United States*, 225 F. 2d 650.

brought under control within the 1600-acre tract by August 11, 1951, where it smoldered until September 20. On the latter date, it escaped from the area onto lands including those of appellants.[3]

The negligence charged to the United States by the complaints consisted in general of:

(1) the failure to require the Railroad to maintain proper safety precautions in the operation of its trains;
(2) the failure to require the Railroad to keep its right-of-way clear of inflammable materials;
(3) the failure to maintain adjoining public lands in safe condition; and
(4) the failure to extinguish the fires by utilizing insufficient manpower, tools, equipment, water and supplies before the forest fire reached appellant's property.

In affirming the district court's dismissal of the complaints, this Court determined that, under the allegations measured in terms of Washington law, the sole proximate cause of the damage was the recurrence and spread of the fire after it had been contained and brought under control in the 1600-acre tract. 225 F. 2d at 644. For this reason, the Court held that liability could not be predicated upon conduct allegedly occurring prior to the spread of the fire to that tract. *Id.* The Court nevertheless went on to rule that, in any

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[3] The allegations of the *Rayonier* complaint were summarized by this Court in its earlier opinion. 225 F. 2d at 643-644. As this Court noted, the allegations of the *Arnhold* complaint were substantially the same. See 225 F. 2d at 651.

event, the Government was under no duty to maintain the Railroad's right-of-way in satisfactory condition since (1) the right-of-way was at least equivalent to an easement and (2) the duty to third persons to maintain an easement rests solely upon the holder of the dominant estate. *Ibid.* at 646. Further, the Court determined that, under the common law, the alleged failure to maintain safe conditions on property adjoining a railroad right-of-way does not render one liable for damages because a fire, originating on the right-of-way, spreads across his land to other land. *Ibid.* at 646-647.

Turning then to the liability of the United States for the asserted negligent failure of the Government to prevent the spread of the fire from the 1600-acre tract, the Court held that (1) the Forest Service was fighting the fire in the capacity of a public fireman; and (2) the Supreme Court in *Dalehite* v. *United States,* 346 U.S. 15, had determined that the Tort Claims Act does not extend to claims grounded upon the asserted negligent failure of public firemen to extinguish a fire. 225 F. 2d at 645-646. In determining that the fire was being fought in the capacity of public firemen, the Court ruled that, under Washington law, there was no obligation on the United States as a landowner to extinguish the fire. *Ibid.* at 648-649.

The Supreme Court vacated this Court's judgments. *Rayonier Incorporated* v. *United States,* 352 U.S. 315. In doing so, however, it held simply that the United States may be held liable under the Tort Claims Act for the derelictions of its public firemen. It did not pass upon this Court's interpretation of Washington law regarding proximate causation or landowners' re-

sponsibility, other than to suggest, without elaboration, that that interpretation might not have been "wholly free" from the acceptance by this Court of the statements in the *Dalehite* opinion respecting public firemen. 352 U.S. at 320.[4] The cases were remanded to permit the district court to determine "whether the allegations and any supporting material offered to explain or clarify them would be sufficient to impose liability on a private person under the laws of the State of Washington." *Ibid.* at 321.

2. *Summary of the evidence adduced at trial.*[5] At all times pertinent to this litigation the United States owned certain tracts of forest lands, including Section 30, Town 30 North, Range 10 West, Willamette Meridian, on the Olympic Peninsula in the State of Washington. These lands were in the Soleduck District of the Olympic National Forest.

Some time prior to 1951, and effective during that year, the United States entered into a "Cooperative Agreement" with the State of Washington. Under the agreement, the United States was responsible for fire protection on all lands within a designated area, whether in national, state, or private ownership. The United States undertook to take "immediate vigorous action" to control fires occurring within this protected area. The agreement did not, however, specifically re-

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[4] With regard to the *Dalehite* discussion of public firemen upon which this Court had relied, the Supreme Court indicated that it had been necessarily rejected in *Indian Towing Co.* v. *United States*, 350 U.S. 61.

We do not believe that, to any extent, this Court's interpretation of Washington law rested upon the *Dalehite* case.

[5] A more detailed treatment of many facets of the evidence is contained in the argument portion of the brief, *infra*, pp. 27-55.

quire the United States to abate fire hazards on any lands within such area. This agreement covered Section 30 and all other land burned prior to September 20, 1951, in the forest fire, as well as most of plaintiffs' property burned thereafter in the so-called "Forks fire." (R. 173-174; Fdg. IV, R. 230; Exh. 24.)[6]

The United States owned all of the land in the 60-acre fire area; and part of the land in the 1600-acre fire area was owned by the United States and the remainder was owned by appellee Fibreboard Products, Incorporated (Fdg. IV, R. 230).

Under a conditional sales contract from United States Spruce Corporation dated March 31, 1937, and to and including all times pertinent to this action, P.A.W. had a conditional sales contract vendee's interest in, and operated, a common-carrier railroad between the Towns of Forks and Port Angeles, Washington, a distance of approximately 70 miles, which passed through the Section 30 in a general east-west direction. Under the terms of this contract, P.A.W. had possession of the railroad property, and agreed, among other things, to maintain the property in a good and safe operating condition, and to comply with all laws and lawful regulations pertaining in any manner to the operation thereof. Provision was made for forfeiture of the vendee's rights upon default in performance of any of the covenants in the contract (Exh. 7).

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[6] For convenience the fire from the time of its origin and for approximately twenty-four hours thereafter on August 6 and 7, will be designated the "60-acre fire"; thereafter from August 7 to September 20, as the "1600-acre fire"; and on and after September 20, 1951, as the "Forks fire."

The 100-foot wide railroad right-of-way through Section 30, was conveyed by the Clallam Lumber Company to the Siems, Carey-H. S. Kerbaugh Corporation by deed dated December 28, 1918 (Exh. 3); and by the Siems, Carey-H. S. Kerbaugh Corporation to the United States Spruce Corporation in March 1919 (Exh. 4).

Subsequent to the execution of the conditional sales contract between the Spruce Corporation and P.A.W., Spruce Corporation assigned and transferred all of its interest in and to the contract to the United States on November 30, 1946 (Exh. 8); and as of the same date conveyed to the United States all of its railroad property. The document covering this grant contained the following provision:

> It is expressly understood that the rights of the Grantor herein to so much of the right of way over and across the above described sections as is located upon lands comprising a part of the Olympic National Forest are limited to those rights thereto of use and occupancy acquired by virtue of that certain letter dated August 5, 1918, addressed to the Secretary of War by the Secretary of Agriculture providing for the construction and maintenance of the said road over lands within the Olympic National Forest, which rights were assigned to the United States Spruce Production Corporation by the Acting Director of Aircraft Production by an instrument in writing dated October 10, 1918, and further, to those rights acquired by the Port Angeles Western Railroad Company

> under a formal application for a right of way across the said Olympic National Forest, which was filed with the United States Department of the Interior on May 3, 1938 and approved September 18, 1939 subject to the terms and conditions of Section 24 of the Federal Power Act of June 10, 1920, which rights were acquired by Grantor herein under that certain indenture executed by the Port Angeles Western Railroad Company the 13th day of December, 1937, which instrument is recorded in Volume 136 at Page 627 of the Deed Records of Clallam County, Washington. (Exh. 5.)

In connection with and as part of the 1938 application for a right-of-way mentioned in the grant, and as required by the Right-Of-Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. 934, and Regulations of the Department of Interior thereunder, the Railroad entered into stipulations with the United States Department of Agriculture, Forest Service, and the Department of Interior, National Park Service, on July 18, and August 2, 1939, respectively. In these stipulations the Railroad agreed, among other things:

> 1. To require its employees, contractors and employees of contractors, both independently and at the request of [forest and national park service officers] to do all reasonably within their power to prevent and suppress forest fires.
>
> 2. To allow officers of the [forest and national park service] free and unrestricted access in, through and across all lands provided by said right

of way in the performance of their official duty * * *

3. To comply with the regulations of the [Departments of Agriculture and Interior] concerning the [national forest and park] * * *

* * * * *

7. To prevent the spread of fire originating on the Applicant's right of way, or through its agency or neglect, * * *. The provisions of this paragraph shall apply to the entire right of way of the Applicant within the exterior boundaries of the Olympic National Forest.

8. To clear and keep clear of any timber and other inflammable substances, all of said right of way, all other lands owned or controlled by the Applicant as a right of way however acquired, lying between the points where the center line of said right of way intersects said [forest and park] boundaries, and all lands of said [forest and park] within 200′ of said centerline; * * *

* * * * *

12. To cut snags over 15′ in height 12″ D.B.H. within 150 feet of center line. To clear and keep clear for a distance of 2 to 4 feet beyond end of ties, the grade to mineral soil in a manner satisfactory to the [forest and park] officer in charge.

13. To burn inflammable material accumulating during construction or maintenance within 25 feet on each side of the track in the discretion of the

> [forest and park] officer in charge. * * * (Exhs. 10 and 11.)

Neither in these stipulations nor in the conditional sales contract did the United States agree to assume any obligation to maintain the right-of-way or abate any fire hazardous condition thereon.

Because of financial difficulties, P.A.W. had for some time prior to August 6, 1951, permitted its right-of-way to fall into a substandard condition in that grass, weeds, and other vegetation grew near and between the tracks; about twenty-five per cent of the ties were rotten; and old ties which had been removed were scattered along the right-of-way within a few feet of the tracks (R. 174-175; Exhs. 18-22; Exh. 177, p. 5).

The Soleduck Valley, through which the Soleduck River flows, runs in a general east-west direction. On the Olympic Highway in Section 30, and at a point approximately 200 to 300 feet from the Soleduck River, there is a group of buildings known as Heckleville. South of this point at a distance of one-quarter to one-half mile were the tracks of the P.A.W. About a mile east of Heckleville, Fibreboard maintained a logging camp known as Camp One which was sometimes referred to as Soleduck. Approximately four miles west of Heckleville on the Olympic Highway, the Forest Service maintained Snider Ranger Station, and about two miles directly northwest of Heckleville it maintained North Point Lookout. Also on the Olympic Highway and about 14 miles west of Heckleville, Rayonier operated a logging camp at Sappho. Farther west on the highway, the State of Washington main-

tained and operated a forestry office, including a fire suppression crew of 7 or 8 men and equipment, at Tyee which was 18 miles west of Heckleville (Exh. 177, pp. 1-4, 8).

All of the duties of the United States, both as landowner and under the Cooperative Agreement with the State of Washington were exercised in this area at the local level by District Ranger Floe of the Snider Ranger Station and Forest Service employees under his supervision. These employees included, among others, a small group of fire fiighters known as a fire suppression crew. Necessary equipment for this crew, including radios, was maintained at the station as well as certain weather instruments to measure humidity, temperature, and wind velocity. There was at the station a so-called "fire suppression plan" which was in effect in this District during the summer of 1951 (Fdg. VII, R. 231; Exhs. 14 and 177, pp. 3, 4 and 8).

The spring and summer months of 1951 were among the driest on record in the Soleduck District. Burning conditions in August 1951 were severe. A forest closure notice was issued by the Forest Service covering the period July 2 through September 15, 1951, as was normally done each year (Fdg. VIII, R. 231-232; Exh. 27; Tr. 4546).[7]

Around mid-day on August 6, 1951, a P.A.W. locomotive ignited a number of small spot fires along the Railroad right-of-way in Section 25, Town 30 North, Range 11 West, Willamette Meridian, and in Section 30 which was immediately to the east thereof. The

[7] "Tr." refers to the transcript of evidence which is not contained in the printed record under order of this Court (R. 335-339).

P.A.W. train crew discovered and extinguished one of these fires by backing up the train, putting water on the fire from the supply which it carried and then digging out the fire (Exhs. 61, 177, p. 9; R. 175; Fdg. X, R. 232).

At 12:30 p.m. on August 6 smoke from a spot fire in Section 25 was reported to the Snider Ranger Station by the North Point Lookout. District Ranger Floe promptly dispatched to this fire his entire immediately available fire suppression force under the supervision of Assistant District Ranger Evans. This crew went to the fire in a radio-equipped panel truck. Evans also had with him hand tools for all crew members, backpack cans and a walkie-talkie radio (R. 175-176, Exh. 177, p. 10).

Evans arrived at the fire about 12:45 p.m. and promptly informed the District Ranger of the size and characteristics of the fire. Floe advised him that he would try to get a railroad locomotive to return to the scene of the fire to help put it out. This fire was soon brought under control by Evans and his crew (Exh. 177, pp. 10 and 11).

Between 12:30 and 1:00 o'clock Floe called the timekeeper at Fibreboard Camp One and asked him to have the train crew bring the locomotive back to the fire at Section 25. Thereafter Floe called repeatedly trying to find out why the engine did not return. A member of the P.A.W. crew was standing by at a telephone beside the tracks, but Floe did not know of the existence of this P.A.W. phone. Meanwhile the Railroad crew, aware at least of one fire on the right-of-way, had stopped at Camp One intending to return the locomo-

tive to put out this fire. But when they attempted to back up the engine they found that a broken equalizer bar prevented them from doing so. Prior to 1:30 Floe had also called the Lookout to determine if he could see the train, and he had also tried three times without success to reach the President of P.A.W. Floe did not learn of the breakdown of the engine until at least 1:35 p.m. (R. 176; Fdg. X, R. 232; Exh. 177, pp. 11 and 13; Tr. 534-538, 746-751, 3429-3435).

At 1:00 p.m. the North Point Lookout reported to Snider Station the smoke of another spot fire, which he estimated to be about one-eighth acre in size. This fire had started on the right-of-way in Section 30 almost due south of Heckleville, and was the only spot fire which was not extinguished promptly. Floe knew of the location of the fire and was aware of the physical characteristics of the area around it (Exh. 177, p. 11; Tr. 526).

If the P.A.W. engine had returned, as Floe anticipated when he called for it, it automatically would have taken care of the Heckleville fire on its way back and put it out. It was the nearest and fastest equipment. It had a pump with tremendous steam pressure, water in the tender, and a 500-foot hose of 1½" diameter. An engine thus equipped is a potent striking force on a small fire, equivalent to an initial attack crew; and Floe's reliance upon it was prudent action on his part (Tr. 826-27, 865-67, 2744, 3436, 3473, 3587-90, 3763, 3855, 4017).

After several unsuccessful attempts to reach Evans by radio, Floe finally talked with him about 1:30 and directed him to the Heckleville fire. Evans found that

the road went only about one-quarter of a mile ahead, and he and Floe concluded that the best way to the fire was around by Snider Station on the highway (Tr. 730-33, 1001-04, 1169-71, 3430-33, 3438-9).

At about this time Evans was joined by two more Forest Service employees, with a power wagon, jeep and water. Taking three men with him, Evans left for the Heckleville fire and en route met a Fibreboard tanker which Floe had previously ordered for the first fire (R. 176, Exh. 177, pp. 11 and 12; Tr. 1005-8, 3433).

Between 1:30 and 2:00 p.m. Floe telephoned the P.A.W. President requesting him to authorize the use of a locomotive owned by Rayonier; and at the same time he called Sappho Camp and requested the locomotive. By 2:00 p.m. he was advised that the engine was being sent. At 2:10 p.m. he requested that the State fire crew be alerted to stand by. At 2:27 the North Point Lookout reported to him that the Heckleville fire was about two acres in size (R. 176; Exh. 177, p. 14; Tr. 758, 832).

In the meantime Evans, having stopped at Snider Station to pick up additional equipment, arrived at the Heckleville fire at 2:30 p.m., after traveling about five miles by truck and foot and wading the Soleduck River. He promptly reported to Floe the dimensions of the fire which was then burning between the tracks and on the right-of-way. On the north side, it covered an area about 200 to 300 feet along the track 100 feet deep, and there were two small spots to the south. He estimated the size at about an acre. At this time Evans considered this a small fire and believed that he could put it out with the men he had.

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When he received Evans' report, Floe immediately requested the assistance of the State crew. At about 2:40 p.m., he asked P.A.W. to have Fibreboard send a bulldozer and crew. At the same time, he called the Rayonier camp for men and equipment and within a few minutes was advised that they were on their way (R. 176-177; Exh. 177, pp. 14a and 15, Tr. 1012-14, 1023-26, 1045, 1122, 1128, 1129, 1279-1280, 1962).

At 3:00 p.m., Evans advised Floe that the fire was spotting ahead out of control of his men and equipment at the scene. At 3:15 the Rayonier locomotive arrived at the fire with its crew and two Forest Service men which it picked up en route. In the meantime Evans, having been advised by Floe that more men were coming, went toward Camp One to direct men and equipment to the fire. En route he met a P.A.W. crew of seven men with hand tools and sometime around 3:30 a State crew of seven or eight men arrived. About 4:00 p.m. Rayonier's crew of twenty-five men reached the fire site. By 5:00 p.m. two Fibreboard bulldozers, a P.A.W. locomotive, four Rayonier hand pumps, and at least fifteen additional men were on the fire (R. 177; Fdg. X, R. 233; Exh. 177, pp. 15, 16, 19 and 20; Tr. 1027-30, 1152-54, 1288, 1557).

When an experienced Forest Service employee arrived at the Station, Floe left for the fire, arriving at about 4:30. At this time the fire was in the second growth sapling timber on Camp Creek Ridge (Exh. 177, p. 20).

At about 6:00 p.m. two portable pumps were placed in Camp Creek and a crew of Rayonier men pumped water on the fire throughout the night. By nightfall

the fire covered an area of about 60 acres. By this time the wind had died down; it was quiet, and some fog had settled. Evans left the fire between 9:00 and 9:30, returning to Snider Station where Forest Service men were in conference developing plans and organization for fighting the fire on the next day (Fdg. X, R. 233; Exh. 177, p. 21, Tr. 844-47, 1833).

The fire did not change much during the night. On August 7, at about 4:00 or 4:30 a.m. Evans and a crew of fourteen men arrived at the fire, and a National Park Service crew of six or seven arrived at the same time and place. These men, together with twenty from Fibreboard, and two bulldozers with men to operate them, a power wagon and jeep with water tanks, and two or three portable pumps and hoses out of Camp Creek made up Evans Division III on the fire. This Division on the west and south sides, together with Division II extending easterly and northerly and Division I along the north and west sides, completely encircled the fire area. On the morning of the 7th there were about 165 men on the fire plus sixteen overhead (Exhs. 66, 177, pp. 21-22; Tr. 1066-72, 1095, 1184-87, 1468).

A fire line substantially all the way around the fire was completed prior to 2:30 p.m. on August 7. At that time a stiff breeze arose, driving the fire over the lines through the air and out of control. Under the influence of the topography the fire went so fast that it was not possible to stop it. It went uphill some 200 feet in about five minutes; and it spread to the south and west over a 1600-acre area (Tr. 623-28, 1074-78, 1196, 1419-20, 1474-9, 1750-1).

While there is some conflict in the testimony as to whether or not a fire line should have been built on the night of August 6, experienced men who were familiar with the site, and experts who had experience in the area with night fire fighting, agreed that because of the location of the fire in sapling timber and the characteristics of the terrain, night fighting here would have been hazardous for the men, and good judgment dictated that it not be done (Tr. 844-45, 1585-7, 2098, 3442, 3598, 3706-9, 3774-80, 4038-39).

The fire was contained and controlled on the 1600-acre area by August 10, 1951. At that time the fire line had been completed around the perimeter and a secondary line was constructed along the west boundary of the area and about 600 feet from the first line. There were old logging landings in the 1600-acre area, two of which on the westerly side thereof have been designated throughout this action as L-1 and L-2. L-1 was adjacent to a gravel pit and had little or no debris on it (R. 177; Fdg. XI, R. 233; Exh. 177, pp. 22 and 23; Tr. 1323-26).

From August 11, to September 19, 1951, mop-up work was carried on in the 1600-acre area. Work was done particularly on a 50-foot wide strip inside the perimeter to get this strip "dead out." A day crew was on throughout this period and smokes were put out whenever they appeared. L-1 and L-2 continued to show smoke from time to time. About 2:30 p.m. on September 13, two fire spots appeared on the westerly side, one on the line and one just over the line. A crew and tanker extinguished the fire that night (Tr. 1096-

1101, 1105-9, 1490-6, 1500-2; R. 177-178; Exh. 177, pp. 23-24).

Throughout this period there were days when no smokes appeared; and apart from L-1 and L-2 and one other smoke, there were no smokes for five days prior to September 20. In an area such as this, fires can smolder without visible smoke, and it is almost impossible to put out such fires entirely. They have been known to smolder throughout the winter and break out in the spring. Officially this fire was declared out on December 15, 1951, but it flared up in 1952 (Tr. 882-3, 1101-3, 1503-13, 2662).

Some time between midnight and 4:00 a.m. on the morning of September 20, 1951 "an extraordinary concurrence of high temperature, low humidity and gale-force wind" caused hidden embers to burst into flame inside the 1600-acre area and to cross or jump the fire lines. The fire quickly spread to inflammable material to the west of the area; and from there it moved rapidly and at times by great jumps for a distance of twenty miles in a southwesterly direction to and within the Town of Forks (R. 178; Fdg. XII, R. 233-234; Exh. 177, pp. 25 and 26).

The fire was first seen about 3:15 a.m. on the morning of the 20th by a State Service Lookout. He called the State Warden, who drove to the westerly edge of the 1600-acre area, arriving about 4:00 a.m. At the point where he stopped there was solid fire in front of him. By 5:00 a.m. the fire had jumped through the air to Bigler Mountain, a distance of two or three miles, and within a few minutes it jumped from there to Fan-

stock Creek, a distance of about six miles (Tr. 697, 912, 1704-8, 1716-20).

The State Lookout who first saw the fire estimated the wind at that time at about 40 miles per hour; and the State Warden estimated it at 32 to 38 miles an hour. Fibreboard's logging manager, in the many years that he had been in the area, had never known an east or northeast wind to blow that hard in September. Another witness estimated it at 30 to 45 miles per hour, characterizing it as "terrific", and still another had seen nothing like it in the area during a fire season since 1913 (Tr. 1743, 2104-5, 3211-15, 3290, 4401).

September 19th, the day preceding the breakaway, was a Class 3, or just average, fire danger day, and the evening forecast for the next day gave no indication of the weather which actually occurred (Tr. 2070-75, 3318-24). All of the damages for which appellants seek recovery herein were caused on and after September 20, 1951, following escape of the fire from the 1600-acre area (R. 178).

Although the district court found that P.A.W. and the United States failed to use ordinary care in maintaining the Railroad right-of-way in a reasonably fire safe condition, it also found that it had not been "established by a preponderance of the evidence that such failure to exercise ordinary care proximately caused or contributed to the start or subsequent spread of the Heckleville fire." (Fdg. XIII, R. 234.) And although the court found that the United States failed to act as promptly, vigorously and continuously as it was required to do in the exercise of ordinary care in at-

tacking the Heckleville spot fire and attempting to confine it to the 60-acre area, it also found that it had not been "established by a preponderance of the evidence * * * that there [was] any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area" (Fdg. XVI, R. 234-235).

Further, the court found that the plaintiffs had not shown by a preponderance of the evidence that the United States was negligent "in mop-up or other fire-fighting activities after August 7, or in any other particular alleged by plaintiffs" except as heretofore noted (Fdg. XVII, R. 235).

Finally, the court found that the plaintiffs had not sustained their burden of proving by a preponderance of the evidence "that any of the damages claimed were proximately caused or contributed to by any negligence on the part of any defendant herein," and that the "sole proximate cause of the damages to plaintiffs * * * was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951" (Fdg. XVIII, R. 235-236).

3. *Unsupported assertions in appellants' briefs.* The briefs for the respective appellants contain numerous statements which we believe a reading of the transcript will show to be either unsupported by the record or based upon material taken out of context. Collectively, these statements give what we submit is an inaccurate picture of events and circumstances which may be deemed pertinent on this appeal. For this reason, we set forth here illustrative examples from each of the briefs. In our discussion of the district court's findings of fact, *infra,* we take issue with other statements made

by appellants which we think the record will not support.

The Arnhold Brief

(a) In the course of its discussion (A. Br. pp. 8-9) [8] of events occurring on *August 6,* appellants state (bottom p. 8) that Floe knew that if the fire escaped into the adjacent slash area with a strong wind behind it, there was a good chance that it would burn westerly to or beyond Forks. The record references given for this statement are to testimony of Floe respecting the situation not on August 6 *but on September 20* when the fire was in the 1600-acre area (see Tr. 697-9). There is absolutely no evidence to indicate that on August 6, when merely a spot fire existed, Floe knew that, given strong wind conditions, it might burn westerly to Forks. In fact, on August 6 the wind was blowing in and easterly direction (Tr. 526); and Floe testified that had the fire been left unattended, it would have gone east and southeast (Tr. 738-9).

(b) In discussing the situation which obtained on the afternoon of August 7, appellants quote (A. Br. p. 13) from the testimony of the Forest Service crew foreman Drake. The fact of the matter is that the quoted testimony (Tr. 1567) related to events on the prior day when there had not been a fire line. On August 7, contrary to appellants' assertion, there was a completed fire line wet down on both sides at the point where the fire spotted over the line (Tr. 1275).

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[8] "A. Br." refers to the *Arnhold* brief; "R. Br.", to the *Rayonier* brief.

(c) Appellants assert (A. Br. p. 18) that McDonald, the State Warden, was an eyewitness of the Heckleville fire breakaway. The supplied transcript reference does not support this assertion. To the contrary, the transcript reflects he did not witness the breakaway but was advised of it by the State Lookout at Gunderson after it had occurred (Tr. 1704-5). Insofar as is known, no one witnessed the breakaway.

(d) Appellants (A. Br. p. 19) quote from Exhibit 151, a Forest Service document pertaining to California. Appellants do not note, however, that Exhibit 151 was never received into evidence. See p. a37 of Appendix to *Arnhold* brief.

(e) Appellants suggest (A. Br. p. 28) that the negligence of the Government was in the creation of an unreasonable risk of a fire occurring and escaping to their damage. They state that the district court repeatedly "so characterized the risks" and on page 29 offer in support of that claim, *inter alia,* the observation of the district court that "a poorly kept right of way would, of course, be more likely to contribute to starting the fire or its spread afterwards". This quotation was taken out of context by appellants. The court stated *immediately* after the quoted passage that there "was not even a scintilla of evidence" justifying it to find as a fact that the Heckleville fire "was causally related to the conditions complained of" (R. 268).

(f) Appellants contend (A. Br. p. 29) that it is clear from the district court's findings that the negligence of the United States (and the other defendants) continued at least up to August 10, 1951. But the court expressly found (R. 235) that they had not established

that the United States "failed to use reasonable care in mop-up or other firefighting activities after August 7."

(g) Appellants refer (A. Br. p. 36) to the court's finding that the sole proximate cause of their damage "was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951." In an accompanying footnote, they suggest that this finding fell far short of a finding that the weather conditions were extraordinary and unusual, and imply that the court did not make such a finding. In Finding XII, however, the court specifically found (R. 233) that "[i]n the early morning of September 20, at some time between midnight and 4:00 a.m., an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred * * *".

The Rayonier Brief

(a) Appellant states (R. Br. p. 18) that Floe "did not do one single thing" about the Heckleville fire "until 1:30 p.m." The uncontradicted evidence plainly shows, however, that Floe called the fibreboard timekeeper repeatedly after 1:00 p.m. to find out where the P.A.W. engine was, but without success; that he called the North Point Lookout requesting that he let Floe know when he could see the engine; that he called Evans a number of times before he reached him at 1:30; and that the P.A.W. engine which had been ordered previously would automatically on its return trip pass over and take care of the Heckleville fire (Tr. 746-747, 866, 3429-3434).

(b) Appellant claims (R. Br. p. 19) that prior to 1:30 p.m. Floe relied "exclusively on the hope that the

PAW broken-down locomotive would get repaired and returned to the Heckelville fire." But Floe did not know prior to 1:30 p.m. that the P.A.W. engine had broken down (Tr. 749-751).

(c) The statement (R. Br. pp. 19-20) that Floe did "nothing" between 1:30 and 2:05 p.m. is contradicted by the undisputed testimony that between 1:30 p.m., when Floe directed Evans to go to the Heckleville fire, and 2:00 p.m., he called the Manager of P.A.W. with respect to obtaining a Rayonier engine for the Heckleville fire, and he called Rayonier's camp at Sappho and requested the engine (Tr. 757-759, 832).

This evidence also contradicts appellant's statement (R. Br. p. 20) that "Floe's first affirmative action to get outside help through anyone but the PAW was at 2:10 p.m."

(d) Contrary to appellant's assertion (R. Br. p. 22) Evans did not leave the fire at 3:00 p.m., for an inexplicable reason. The evidence plainly shows that Evans, having been advised that more men had been ordered, went to meet them and direct them to the fire (Tr. 1027-1030, 1047-1049, 1152-1153).

(e) Appellant states (R. Br. pp. 24-25) that a crew continued to pump water on the fire "until 6 or 7:00 p.m." The uncontradicted evidence shows that a Rayonier crew pumped water on the fire throughout the night (Tr. 1274, 1833-1834, 1848-1851, 1874, 3515-3518). This same evidence refutes the claim (R. Br. p. 27) that "not a man or piece of equipment was working on the fire at dawn." In addition, Evans arrived at 4:30 a.m.; a Forest Service crew was on the line at about that time and relieved the night pumper crews;

the Forest Service fire crew foreman Drake got to the fire at 4:30 with 6 or 7 men; and another Forest Service man John Leyh was also there at that time (Tr. 1066, 1074-1076, 1184-1187, 1467-1470, 1659).

SUMMARY OF ARGUMENT

I

The district court found that appellants failed to establish by a preponderance of the evidence that negligence on the part of the Forest Service caused or contributed to the start or spread of the Heckleville spot fire; the presence of fire in the 1600-acre area; or the break away of the fire on September 20. The court also found that the breakaway was caused by the extraordinary and unforeseeable weather conditions that prevailed on September 20. Appellants attack these findings on the basis of a careful selection of isolated portions of the evidence. On the record as a whole, however, the findings cannot be characterized as "clearly erroneous". To the contrary, they have clear support in the testimony and exhibits.

II

It follows from the findings of the district court that no negligence of the United States was a cause in fact of appellants' damage. Under Washington law, the existence of causation in fact is a *sine qua non* of liability.

III

Since the district court found that it was not established that the condition of the right-of-way caused or contributed to the start or spread of the fire, it should

not be necessary for this Court to reach the question of the correctness of the holding of the district court that the United States had a duty to eliminate fire hazards on the right-of-way. Nevertheless, the United States was under no such duty (the maintenance of the right-of-way being the responsibility of the railroad alone), and the district court, therefore, erred in finding any governmental negligence in connection with the condition of the right-of-way.

ARGUMENT

Introduction

The district court has determined that the damage to appellant's property was not proximately caused by negligence on the part of Government employees. The determination was based upon detailed findings of fact made by the court following an extended trial at which many witnesses, both lay and expert, testified and a substantial number of exhibits were introduced. This evidence dealt with every aspect of the origin of the forest fire, the circumstances of its spread and the procedures undertaken by the Forest Service to suppress it. In many respects it was undisputed; in some, however, there were sharp conflicts.

As appellants recognize, the critical findings of the court were:

(1) that it was not established by a preponderance of the evidence that the negligent maintenance of the P.A.W. right-of-way in the area of the Heckleville fire proximately caused or contributed to the start or subsequent spread of that fire (Fdg. XIII, R. 234);

(2) that, although the Forest Service had not exercised reasonable care in its initial attack upon the Heckleville fire, it was not established either (a) that, had such negligence not existed, the fire would have been contained in the 60-acre area or (b) that there was any causal relationship between the negligence and the ultimate existence of fire in the 1600-acre area (Fdg. XVI, R. 234-5);

(3) that the United States was not shown to have failed to use reasonable care in its fire fighting activities, or in any other respect, after August 7 (Fdg. XVII, R. 235);

(4) that in the early morning of September 20, an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred and caused a flare-up of fire inside the 1600-acre area (Fdg. XII, R. 233); and

(5) that the sole proximate cause of the alleged damage to appellants' property was the unforeseeable and fortuitous combination of wind and weather conditions which occurred on September 20 (Fdg. XVIII, R. 235-6).

We show in Point I below that appellants' attack upon these findings as "clearly erroneous" is without merit. While appellants have carefully selected from the evidence isolated bits of testimony favorable to them, on the record as a whole the findings of the court were fully justified, if not required. Even if it could be said that another trier of the facts might have made different findings and drawn other inferences, appel-

lants cannot meet their burden of showing that a reasonable fact finder could not have found as did Judge Boldt; *i.e.,* of leaving this Court on a review of the "entire evidence" with "the definite and firm conviction that a mistake has been committed" *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395.

In Point II, we demonstrate that, under Washington law, the findings compelled the conclusion of Judge Boldt that the United States was not liable for the damage to appellants' property. In Point III we show that, in any event, it is questionable whether Washington law imposed upon the United States an actionable duty to these appellants to maintain the P.A.W. right-of-way.

I

The Challenged Findings of the District Court Are Supported by the Record

A. *Appellants Failed to Establish that the Condition of the Right-of-Way in the Area of the Heckleville Fire Proximately Caused or Contributed to the Start or Spread of that Fire (Finding XIII).*[9]

1. Appellants cannot challenge that there was a total lack of direct proof that a negligent accumulation of combustibles caused or contributed to the start of the Heckleville fire. The fact is that no witness had any actual knowledge of the condition of the right-of-way at the point where the fire started. There was absolutely no testimony that the fire originated in inflam-

[9] While we show here that this part of Finding XIII is supported by the evidence, we argue alternatively in Point III *infra* that the Government was under no duty to maintain the right-of-way.

mable debris, let alone in debris which should have been removed in the exercise of reasonable care.

In this connection, it is to be noted that there was testimony to the effect that, in Section 30 generally, the brush was not as heavy or as close to the tracks as in other areas and the right-of-way was cleared to five or six feet from each side of the roadbed (Tr. 189, 265, 295-6). Further, Evans stated that the fire had started in a cut and that there were no stumps on the right-of-way at that point. He could not recall specifically that there were rotted or discarded ties on the right-of-way within the perimeter of the fire (Tr. 1012-14, 1146-49, 1315-16).

Appellants Arnhold suggest (A. Br. pp. 22-24) that it was not necessary to supply an eyewitness account of the moment of ignition of the fire. In the single Washington case which is cited for this proposition,[10] however, there was ample circumstantial evidence to *permit* the trier of fact to draw the inference that the fire (1) was started by the defendant railroad's locomotive and (2) ignited in debris on the right-of-way. Among other things, the distance from the passing locomotive to the barn was approximately 50 feet; debris covered this whole distance; and there was no indication of a strong wind which might have taken the sparks from the locomotive farther away. 27 Wash. at 513. Moreover, the court stressed that the question was whether the jury was warranted in its findings and that questions of the weight and sufficiency of evidence "is usually, if not always, a question for the jury." *Id.*

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[10] *Abrams* v. *Seattle & Montana Ry. Co.*, 27 Wash. 507.

In this case, of course, there is no dispute that the P.A.W. locomotive started the fire. The issue is confined to whether an excess of combustible matter caused or contributed to that start. Surely appellants cannot seriously suggest that they were entitled to a finding in the affirmative in the absence of evidence that, at the point of origin of the fire, there was combustible matter which should have been removed. At least not where, as here, the record precludes the drawing of any inferences in this regard from the established facts.

Apart from the consideration that the entire right-of-way was not covered with combustible matter, the evidence discloses that 1951 was one of the driest summers on record in the Soleduck Valley. Moreover, grass grows very rapidly in this district. Even when cut in the spring, as is customary on a properly maintained right-of-way, dry grass and similar materials are to be found during the summer and fall. Normal replacement of ties commences about eight years after construction, and from that time approximately 12½ per cent of the ties are in various stages of decay (Exh. 178 A, B, and C; Tr. 3738, 3752-57, 3806-8).

In these circumstances, the district court was plainly right when it observed that it could not be determined from the evidence "with reasonable probability and without inference on inference" whether any excess of combustible material on the right-of-way was actually at the initial point of the fire (R. 184-5). As the court summarized the situation:

> For all that appears in the evidence, considering the extremely dry ground conditions and low atmospheric humidity at the time, the hot droppings

from the engine might well have started a fire in a sound tie of excellent condition or in little wisps of dried grass or similar material to be found on the right of ways of similar railroads in the area at the time of year in question no matter how well kept up with respect of fire precautions (R. 185).

2. No greater merit attaches to appellants Arnhold's attack (A. Br. pp. 25-27) upon the district court's finding that it had not been established that the undue accumulation of combustible matter caused or contributed to the spread of the fire. Appellants have not pointed to any evidence which compelled Judge Boldt to draw their suggested inference that the fire would not have spread as rapidly had there been just the customary (and non-negligent) amount of grasses and other inflammable material in the area.

Appellants place heavy reliance (A. Br. p. 25) on the testimony—much of it by a witness (LeGear) who did not arrive at the scene until after the fire had already spread over a considerable area—to the effect that brush and ties were burning. But the fire was hardly confined to such matter. It also burned through the grass and other material whose presence on and in the vicinity of the right-of-way was found not to be the result of improper maintenance.

More importantly, that brush and ties burned in a fire does not require the conclusion that they were a substantial contributing factor to its spread. What appellants ignore once again is the prevailing conditions in the area—the dryness of *everything* on the ground and the low humidity. Judge Boldt was free to infer,

as he did, that the causative factor of the rapid spread of the fire well might have been these conditions—rather than any specific material that was in its path.

B. *Appellants Failed to Establish that there Was Any Causal Relationship Between the Forest Service Negligence in the Initial Attack upon the Fire and the Ultimate Existence of Fire in the 1600-Acre Area (Finding XVI).*

1. In its amended Finding XVI (R. 234-5), the district court expressly found that appellants had not established the existence of a causal relationship between the negligence of the Forest Service in its initial attack upon the fire and the ultimate existence of fire in the 1600-acre area. Notwithstanding this finding, appellants in both cases lay stress (A. Br. pp. 14, 29, 38; R. Br. p. 60) on a statement in the court's memorandum opinion—issued several months earlier—to the effect that negligence chargeable to the United States did proximately contribute to the spread of the fire to the 1600-acre area (R. 203). As the appellants should be aware, however, the court intended the amended finding to supersede this statement. In the circumstances, appellants Arnhold's citation of it (A. Br. p. 38) to support an unqualified statement in their brief that the court found negligence of the United States caused the spread of the fire to the 1600-acre area was not justified.

(a) The district court's original Finding XV (R. 212) read in pertinent part:

> Whether, or at what time and place, the fire might have been contained or suppressed within

said area but for such negligence is a matter of speculation and cannot be determined as a reasonable probability under the evidence. Such failure to exercise ordinary care proximately contributed to causing the spread of the original Heckleville spot fire to the 1600-acre area.

And original Conclusion IV (R. 214) read in pertinent part:

> This negligence proximately contributed to causing the spread of fire to the 1600-acre area.

The memorandum opinion apparently was written at approximately the same time as this finding and conclusion. At three separate places in the opinion, the court made statements similar to those contained in original Finding XV (R. 198, 202, 203).

(b) At the argument on their motions for alteration and amendment of the findings and conclusions, and particularly for the deletion of the finding to the effect that the damage to their property had not been proximately caused by negligence on the part of the Government, appellants called the court's attention specifically to original Finding XV (R. 290). In relevant part, Judge Boldt's response was:

> In my judgment, whether that negligence was the cause of the fire escaping and ultimately being in the 60-acre area and the 1600-acre area, is a matter of speculation.
>
> * * * * *
>
> Now, in my opinion, the Forest Service people were negligent * * *, *but there is no showing that*

there is any causal relationship between that and the ultimate existence of fire in the 1600 acre area.

If anything I have said in the findings seems to conflict with this, it is a matter of mistaken wording or language. I thought I covered it by the clause in paragraph XV which says, "Whether or at what time and place the fire might have been confined or suppressed within said area;" namely, the 60-acre area, "but for such negligence of the Forest Service, is a matter of speculation and cannot be determined as a reasonable probability under the evidence." I believe that completely in my own mind, and I do not in any manner withdraw from it.

Now, if the *last* sentence in that paragraph is to be interpreted as in some manner conflicting with the next preceding sentence which I have just quoted, *I am going to delete it from the findings,* and I see now there is such a possibility of that being so interpreted. (R. 292-293) (Emphasis added.)

In accordance with these observations, the court issued amended Finding XVI (R. 234-235), in which it deleted the last sentence of original Finding XV and substituted the following:

> It has not been established by a preponderance of the evidence that had such negligence not existed, the fire would have been contained in the 60-acre area, or that there is any casual relationship between that negligence and the ultimate existence of fire in the 1600-acre area.

Additionally, the court deleted from Conclusion IV the statement that the negligence of the Forest Service proximately contributed to the spread of the fire to the 1600-acre area (R. 237).

Insofar as the memorandum opinion is concerned, the court amended it to eliminate two of the three statements therein which were to the same effect as the deleted portion of original Finding XV (R. 238-241). Unfortunately, the court inadvertently overlooked, and therefore did not also delete, the third reference in the memorandum opinion to a causal relationship. It is this third reference (R. 203) which appellants seize upon in their briefs.

In short, contrary to the implication left by appellants' briefs, the court found without qualification that the negligence of the Forest Service in its initial attack upon the fire was *not* shown to have had any causal relationship to the later presence of fire in the 1600-acre area. The statement in the memorandum opinion upon which appellants rely, and appellants' arguments based upon the premise that the court found the requisite causal relationship to exist (see pp. [illegible], *infra,*) may properly be disregarded.

2. Finding XVI is amply supported by the evidence.

(a) The fire did not, as appellants Arnhold maintain (A. Br. p. 14), grow "unattended from a spot fire to several acres". When Assistant Ranger Evans arrived at the fire at 2:30 p.m. on August 6, with three men, it was something less than an acre in size (Tr. 1279). At this time Evans, an experienced fire fighter who trained

and supervised suppression crews (Tr. 985-8), considered that he could put out such a small fire with the men he had (Tr. 1045, 1122-3). But this fire kept spotting ahead in a breeze of 10 to 12 miles per hour, and at times stronger, so that in the short period of a half hour following Evans' arrival, it was racing and could not be controlled with the men that he had. Once a fire is running you cannot get in front of it; at best you can attempt to flank it, but the flanking movement cannot be completed until the fire stops running, which is accomplished by a natural barrier or cessation of the wind (Tr. 1014, 1029, 1030-1, 1038, 1041-3).

When suppression crew foreman Drake and another Forest Service man arrived at about 3:15 p.m. on the Rayonier engine with its crew and a tank car of water, the engine stopped on the west side of the fire because it appeared dangerous to go through it. At that time the fire was approximately seven acres in size. It was moving to the southeast, and the wind was picking up pieces from stumps and brush and causing the fire to spot ahead (Exh. 72; Tr. 1443-9).

About 4:30, when Ranger Floe arrived, the fire was already in the sapling timber (Exh. 177, p. 20); and by nightfall it had covered an area of about 60 acres, notwithstanding the fact that within two hours after 3:15 p.m. (when the Rayonier locomotive arrived with its crew and the two Forest Service men to assist Evans' crew) there were on the fire seven P.A.W. men, a state crew of seven or eight men, 25 Rayonier men, two Fibreboard bulldozers, four hand pumps, and at least 15 additional men (R. 177, Exh. 177, pp. 15, 16, 19 and 20; Tr. 1027-30, 1152-4, 1288, 1557).

The fire did not change much during the night (Tr. 1056). A 15-man crew pumped water on it throughout the night from two pumps which had been placed in Camp Creek (Tr. 1274, 1833-4, 1848-51, 1874, 3515-18). Apart from this, there was no fire fighting on the night of August 6, because in Floe's judgment building fire line in the rough terrain of the sapling timber at night would have been hazardous for the men. While some of appellants' witnesses were of the opinion that the fire line should have been built on the night of the 6th, experienced fire fighters with personal knowledge of the area agreed with Floe's judgment (Tr. 844-45, 1585-7, 2098, 3442, 3598, 3706-9, 3774-80, 4038-9).

At 4:30 on the morning of August 7 Evans arrived at the fire, and about the same time a Forest Service crew was on the line and relieved the all-night pumper crews. Both Drake, the fire suppression crew foreman, with 6 or 7 men, and John Leyh, another Forest Service man, were also there at 4:30 a.m. A total of 165 men plus 16 overhead made up the fire-fighting force on the 7th, and, grouped into three divisions, they were spaced out to encircle the fire area. Equipment included, in addition to hand tools, bulldozers, a power wagon and a jeep with water tanks, and three portable pumps, and tankers with capacities up to 1,500 gallons of water (Exh. 66; Exh. 177, pp. 21-22; Tr. 1066-72, 1077, 1095, 1184-7, 1468-70). A bulldozer fire line had been completed around Evans' division by about 12:30 p.m. and by 2:30 p.m. the line had been completed substantially around the fire. In addition, Evans' division line which was about 3,000 feet long, had been wet down except for the westerly 200 feet. Until about noon

it was cool and there was no wind (Tr. 1069-75, 1275, 1473, 1545-7).

About 2:30 p.m. the wind sprang up causing the fire inside the line to start burning briskly and throwing sparks, pieces of trees, small limbs, and needles through the air over the completed line in Evans' division. Fires spotted 300 to 400 feet from the line and then blew under the influence of the topography. There were hundreds of spot fires all at once. The fire moved so fast that in about five minutes it went approximately 200 feet up a hill. It was clearly not possible to stop it. By 3:00 p.m. Evans received orders to pull out, and by 5:00 p.m. Drake and other men were ordered out. During the next three days the fire spread south and west over the 1600-acre area (Tr. 623-28, 848-9, 1074-8, 1196-8, 1275-6, 1419-20, 1474-80, 1545, 1571-3, 1750-1).

(b) Appellant Rayonier points (R. Br. 41-43) to the various estimates given by several witnesses of the number of men who could have brought the fire under control at different times during the afternoon of August 6. It also cites a comment by Chief Fire Control Officer Gustafson which was contained in a report written after consideration of the fire by the Forest Service Board of Review.

Rayonier necessarily assumes, of course, that the district court found that the Forest Service was negligent in not employing that number of men mentioned in one or another of the estimates. It is far from clear, however, that the district court was of that view. The finding of negligence was in most general terms—that Floe and his subordinates had not acted "as promptly, vigo-

rously and continuously as they were required to in the exercise of reasonable care'' in initially attacking the Heckleville spot fire and attempting to extinguish it. It was not found that Floe knew or should have known that any specified number of men would be needed.

In this connection, as Assistant Ranger Evans indicated (Tr. 1045), all of the estimates were the product of hindsight judgment. The court itself cautioned against attaching too much weight to such judgments (R. 195-196):

> It is difficult for any person, whether an expert forester experienced in firefighting or not, in appraising such a situation long after the event, to avoid hindsight judgment and opinions predicated on what actually happened as we now know it. Every person responsible for decision and action in such a situation is entitled to have his conduct judged in the light of the situation as it might have appeared at the time to one exercising reasonable care, with full allowance for all of the difficulties and limitations under which the actor was required to make decisions and take action. Under Washington law one required to act in an emergency not caused or contributed to by his own lack of reasonable care will be absolved of a charge of negligence if he acted as a reasonably prudent person might have acted in the same circumstances even though it later appears that the actions taken were not the safest and best available or those which other reasonably prudent persons might have taken in the same situation. * * *

In any event, the district court was not compelled to accept the opinion evidence as conclusively demonstrating that the use of a particular number of men would have necessarily resulted in the control of the fire. Indeed, we submit that there was an ample basis for the court to attach little weight to the estimates.

Gustafson's estimate, for example, was not an unqualified one. Rather, his statement was that, if certain action had been taken, it "may have resulted" in the control of the fire, "at least there was this chance" (see R. Br. p. 42). Moreover, so far as the evidence shows, he had no personal knowledge of conditions in the area. As Ranger McCullough testified, Gustafson (who was located in Washington, D. C.) was talking about things he was a long way away from, and the men in the field did not always agree with him (Tr. 3683-4).[11]

Charles Cowan did not testify (R. Br. p. 42) that seven to twelve men "could have suppressed" the fire. Rather, he said that a crew of ten to twelve men "could have probably" suppressed it if Floe had put such men on standby at 12:30 p.m. on August 6, and then put them on the fire at 1:00 p.m. (Tr. 2393). But it must be remembered that Floe did not even know about the Heckleville fire until 1:00 p.m.

H. H. Jones (R. Br. p. 42) admitted that he had never been in a dispatching position on a fire (Tr. 2937); he had had no experience getting loggers to fight

[11] Floe's estimate that ten men could have suppressed the fire was also qualified. It was made solely in terms of the situation at 1:00 p.m. Floe could not state categorically how many men it would take to suppress a fire of one acre. In his opinion, even a one-half acre fire under extreme conditions might require 40 to 50 men (Tr. 608-10, 744).

forest fires (Tr. 2941); and he had had no experience building fire line in sapling timber at night (Tr. 2944). Further, while his responses were theoretically based upon facts given him in the hypothetical question, some of his time assumptions in the explanations of his opinions were inconsistent with that question, and were contrary to the facts (Tr. 2584-6). At times he even went outside of the assumed facts and took into account evidence which he had heard while he was in the court room (Tr. 2590-1). Upon objection and motion to strike by P.A.W. counsel, Judge Boldt stated that he would take this into consideration in weighing the testimony (Tr. 2591). Finally, Jones admitted that his standards were higher than those of a reasonable prudent forest ranger, and that in all of his answers he used such higher standards (Tr. 2975, 3005).

Walter Schaeffer (R. Br. p. 43) had no fire-fighting experience in the Olympic Peninsula and had never fought a fire in timber such as that on the Peninsula; he had never been in a position where he had to weigh factors involved in supplies of manpower for a fire; he had never served as a dispatcher; he did not know anything about weather conditions on the Olympic Peninsula; and he did not know local practices concerning the calling of crews, or night fire fighting (Tr. 2685, 2691-3, 2709, 2718-20, 2734, 2749).

Norman Jacobson's testimony is cited with respect to what a reasonably prudent ranger would have accomplished (R. Br. p. 43). But he admitted that he considered his judgment better than that of a reasonably prudent ranger, and that his superior knowledge

and better judgment had "crept into" his answers (Tr. 3150-2).

Moreover, in expressing their opinions that the fire could have been extinguished short of the 1600-acre area, appellants' expert witnesses had differing opinions not only as to the number of men required, but also respecting types and amounts of equipment needed (Tr. 2393, 2436, 2445, 2592-4, 2651, 2946, 3056).

In all of the circumstances, we submit that it was for the trier of fact to determine what weight should be attached to the different opinions expressed by witnesses of varying qualifications on a question which, particularly in view of prevailing conditions in the Heckleville area, necessarily involved a considerable amount of conjecture. The weight that was given by Judge Boldt is reflected in his observation:

> In my judgment, under the evidence and considering the conditions existing at the time, it is impossible for me or anyone else to say that the fire could have been contained or suppressed even with the ultimate action by the Forest Service during that period. I will readily agree that one person might think that the fire could have been contained and even put out. But I think there is a reasonable inference from the evidence for another reasonable mind to conclude that it couldn't have been under the conditions existing at that time considering the extremely difficult and hazardous conditions with respect of fire in existence at that time. (R. 292.)

C. *Appellants did not Establish that the United States Had Failed to Use Reasonable Care in its Fire-Fighting Activities, or in any Other Respect, After August 7 (Finding XVII).*

Finding XVII is attacked solely by appellants Arnhold. Appellant Rayonier, while asserting that it does not consider the finding correct, has not included it in its specifications of error and assumes its correctness for the purpose of argument (R. Br. p. 31).

1. Appellants Arnhold's assertion (A. Br. p. 32) that the negligence of the Forest Service continued at least up until August 10, 1951 is not supported by the record. Indeed, two of appellants' own witnesses expressed the opinion that the Forest Service had done excellent fire fighting on the 8th, 9th and 10th of August until the fire was controlled on the 1600-acre area (Tr. 2905, 3068).

2. With respect to the mop-up operations following the control of the fire on the 1600-acre area, appellants Arnhold claim negligence on the part of the Forest Service in "letting known fires continue to smolder"; in "failing to work on fire suppression during the two days it rained"; and in "progressively abandoning mop-up after September 1, 1951 in the hope that heavy rains would complete the mop-up" (A. Br. pp. 15-16). None of these contentions has merit.

The fire was controlled in the 1600-acre area on August 10 or 11 (Tr. 635-636). A fire line completely encircled the area, and on the west side thereof a secondary caterpillar line 10 to 12 feet wide was built about 600 feet distant from the primary line. Forest Service men worked at, and thought they had accomplished,

putting the fire completely out in a strip 50 feet wide just inside the fire line all around the perimeter of the area. On August 9 when a Forest Service regional officer inspected the line, he found it black and satisfactory (Tr. 1323-25, 2100, 4070-1).

There is no fixed formula for the number of men required on mop-up; it is dependent upon the condition of the fire at the particular time (Tr. 3679). But, contrary to appellants' assertion, there was not a progressive abandonment of mop-up after the first of September. From September 1 to 10 there were never less than five men, and from the 10th through the 19th there were from two to five men as conditions dictated, and there were also two Fibreboard men with a truck tanker (Tr. 1490-1502, 3679). While there is some conflict in the testimony as to whether men should have worked on mop-up on the two days when it rained, normally work is not done on rainy days when fire is in the mop-up stage. Such work is no more effective in extinguishing the fire than on any other day; and smokes are not as readily seen during rain as on dry days (Tr. 3823-27).

Certainly the Forest Service did not, as appellants imply (A. Br. p. 16), do little or nothing on mop-up and merely wait for rain. In this connection appellants requested that the district court make a finding that: "Between August 10 and September 20, 1951, Forest Service personnel attempted to extinguish a 50-foot strip around the perimeter of the 1600-acre area and kept the 1600-acre area under surveillance in the daytime, suppressing smokes and flareups as they occurred, and awaited the usual rains of late September and October to extinguish the remaining sparks and

smoldering fires" (R. 220). In rejecting this request, Judge Boldt said in part:

> You say it as though the man were standing there looking at the sparks, and he thought, "Well, I won't go out and put it out but I will wait until the rain comes in the fall." That wasn't the fact picture here.
>
> The fact picture as I understand it and as I said in my memorandum decision, there were periods of days on end when there were no smokes at all. This gives the inference that they knew that there was fire there and they just didn't go and put it out but sat around waiting for the rain, and if that is the inference that is intended to be put, that is unfair.
>
> * * * * *
>
> * * * I don't like the way that it is phrased. In my judgment it is not a true picture of it, although I am not being critical, of course. But in my mind the way this is phrased, it doesn't fit my conception of what they were doing out there. (pp. 261, 263.)

The men on mop-up watched the entire area. As smokes appeared, they put them out, and they never returned to the station in the evening without having put out any fire of which they were aware. L-1 on the west side of the fire area smoldered almost continuously, and L-2 showed smokes from time to time. However, the prior cleaning of both of these landings was an outstanding job. So far as fire hazard was con-

cerned, L-1 was safer than other parts of the area. It was used as a gravel pit; there was no debris on it, and such logs and debris as existed were beyond the gravel pit area; it was about as fireproof as it could be made. Except for the smoldering in the landings, there were several days when one could drive all over the area and find no smokes. With the exception of the landings and one smoke near the river, there were no smokes in the area for five days prior to September 20 (Tr. 851-5, 1331-2, 1329-30, 1503-13, 1539, 1617, 2453, 3799, 3802).

On the morning of the 13th of September Leslie L. Colvill, a Forest Service officer from the Regional Office, inspected parts of the perimeter of the fire area and considered that mop-up work was progressing satisfactorily. From a vantage point on the highway near Heckleville he looked back upon the area and could see no smoke (Tr. 4081). About 2:30 that afternoon two small fires occurred, one spot right on the line and the other across the line in a log. These fires were reported out some time between 5:00 and 6:00 p.m., but the fire flared up again before 7:30 p.m. A crew was summoned and the fire was put out by 2:30 a.m. (Tr. 1108-9, 1217-20, 1222-3). Insofar as the record shows, this was the only flareup between August 11 and September 20, 1951.

There was no night patrol on the fire on the night of September 19. But there is substantial credible evidence that on the basis of the condition of the area, with no smokes for five days except for those noted, and considering the weather forecast on the evening of September 19, no need for such a patrol appeared; and it was not customary under such circumstances to

have one. Further, there is credible evidence that, in view of the nature of the breakaway on the morning of the 20th, a night patrol would not have been effective (Tr. 1597, 1773-5, 1795, 2096, 3599-3600, 3781-4, 4039-41, 4084, 4406). Although appellants' expert witnesses testified that a night patrol should have been used, they all differed in their opinions as to how many men and what type of equipment there should have been (Tr. 2526-7, 2667, 2957-8, 3070).

The nature of the breakout of the fire during the early morning hours of September 20, including its intensity and rapid spread by great jumps through the air, the "extraordinary" weather conditions which caused it, and its unforeseeability are discussed below. While there is no doubt of the fact that by 4:00 a.m. on this morning there was "solid fire" in an area on the west side of the 1600-acre area (Tr. 1704-8), there was insufficient evidence to show from what point the fire came. Although some witnesses had an opinion as to the place of origin (Tr. 1611-12, 2406, 4089), others who saw the fire even at a very early hour testified that they had no idea of the point of origin (Tr. 653-54, 1290). In any event, the preponderance of the evidence shows that it did not come from L-1 (Tr. 1535-37, 2082-3, 4089, 4299-4300).

Although the fire came from some point within the 1600-acre area, this does not mean there was negligence on the part of the Forest Service in the mop-up. This area was rugged terrain; some places were so steep that men could not climb up or down; and there were rock shoots, rock canyons, and slides over and around which

the men had to work. Mop-up on the Olympic Peninsula is more difficult than in any other part of Forest Service Region Six which comprises the States of Washington and Oregon (Tr. 1100-1, 3993-6).

Fires may continue to burn in deep underground roots in such an area despite the best efforts of experienced fire fighters to extinguish them. Even very heavy rains may be insufficient to put them out, and they have been known to smolder throughout the winter and break out in the spring. At least two of appellants' witnesses so recognized. This is precisely what happened to the Forks fire. It was officially declared out on December 15, 1951, and flared up in the spring of 1952 (Tr. 883, 2406, 3088, 3108, 3153). That Judge Boldt had these facts well in mind is apparent from the following:

> In a fire-swept forest area of such proportions and topography it is a practical impossibility to find and put out every last vestige of fire smoldering in buried roots, logs, turf and debris. In such a situation it is common and accepted practice on the Olympic Peninsula and in other Northwest forest regions to keep the area within fire lines under surveillance by daytime patrol and to suppress smokes and flareups as they occur, awaiting the heavy rains of late September and October for complete quenching of every last spark. This is not quickly or readily accomplished even with the heavy and frequent rainfall of fall and winter in this near-coastal region (R. 198-199.)

D. *The Extraordinary Concurrence of High Temperature, Low Humidity and Gale-Force Wind on September 20 Caused a Flare-Up in the 1600-Acre Area (Finding XII) and These Weather Conditions Were Unforeseeable (Finding XVIII).*

In attacking the district court's findings respecting meteorological conditions on September 20, appellants Arnhold make several statements (A. Br. pp. 38-41) which we believe are not supported by the record. There is no evidence, for example, that "like east winds and weather conditions" occurred six days before (A. Br. p. 38). And while appellants claim there that "no weather station in the immediate area of the Heckleville fire, or anywhere else," recorded any wind in excess of that forecast, the fact is that the forecast was for winds from 12 to 16 miles per hour on September 20, and at 8:00 a.m. on that day winds of 25 miles per hour were recorded at Crescent Lake about 10 miles from the fire area (Tr. 2206).

Further, the testimony of appellants' weather expert was based in part upon so-called "aids" for estimating fire weather conditions (Exhs. 168, 168-A; Tr. 2177-80, 2183-6), which aids were merely being tested in 1951 at designated stations which did not include Snider Station (Tr. 3328-9). Also, this expert's estimate of wind velocity in the Soleduck Valley on the night of September 19-20 was based in large measure upon records from Tatoosh Island (Exh. 167; Tr. 2212-15); but the surface winds at Tatoosh are not at all representative of winds in the Soleduck Valley (Tr. 3339-40).

Of far greater importance in connection with all of appellants' factual assumptions concerned with the wind which combined with other unusual weather conditions to cause the breakaway of the fire during the night of September 19-20, no station in the Soleduck Valley made wind recordings on that night (Tr. 2199-2201, 2213). Consequently, the district court necessarily relied upon the testimony of persons who were at or near the fire between 4:00 a.m. and 8:00 a.m. on that morning and described the wind at that time.

Appellants refer (A. Br. p. 40) to an estimate of 10 miles per hour for the wind on that morning. But the witness who made the estimate characterized it as an "outright guess", and, in addition, he was speaking as of 3:30 a.m. outside his home in the Town of Forks, which at that time was far removed from the scene of the fire (Tr. 1665-6). James Anderson did not testify, as appellants state (A. Br. p. 40), that he "would expect" winds of 20 to 25 miles per hour in August and September. Rather, while agreeing that such winds "do occur," he went on to indicate that this was not a usual occurrence (Tr. 3236-37). Again, Fibreboard's manager did not estimate the wind speed on the morning of September 20 "at 25 miles per hour" (A. Br. p. 41). After testifying that there was a "very high wind blowing" (Tr. 4436) and stating that it was "very unusual weather", he estimated with some apparent reluctance that the wind was a "minimum of 25" miles per hour (Tr. 4439).

That the wind was "extraordinary" in its intensity and duration and for the time of year in which it occurred is attested by a wealth of evidence. State Dis-

trict Warden McDonald, who was at the fire on the morning of September 20 about 4:00 a.m., estimated the wind at that time at 32 to 38 miles per hour (Tr. 1743). On the so-called Beaufort Scale, winds of 39 miles per hour and over are gale-force winds (Exh. 164). The Forest Service fire suppression crew foreman estimated it at 25 to 31 miles per hour at 4:30 a.m.; and Floe, who had been District Ranger at Snider Station for many years, said that it was one of the strongest winds he had ever seen and that it blew constantly from 3:45 a.m. until noon (Tr. 695-6, 911).

Petrus Pearson, Fibreboard's logging superintendent, who had lived in Western Washington for 49 years (Tr. 2078), believed that the wind that morning was 30 to 35 miles per hour (Tr. 4498); and as to the nature of the wind, he said:

> I had a tin hat on. * * * I had to hold on to that to keep it on. The wind was picking up sharp bits of gravel and throwing it in your face with a stinging sensation, and there was things rolling around on the road, and the dust was flying. * * * I never saw a northeast wind blow that hard or an east wind. (Tr. 2104.)

Carl H. Russell, who was with the Washington State Department of Forestry for 24 years, who had worked in fire control, and who had been a District Supervisor on the Olympic Peninsula, stated that not since 1913 had he seen as bad a fire day when the wind blew as hard and long (Tr. 4401). The State Lookout at Gunderson who, as far as is known, was the first person to see the fire, and who reported it at 3:15 a.m. on the

20th of September, estimated the wind at 40 miles per hour and said that the lookout tower was "rattling and weaving" (Tr. 3291).

James Anderson, a former Forest Service employee and thereafter a timber cruiser for appellant Rayonier, had had several years experience taking wind recordings on an anemometer. He testified that at two points about nine or ten airline miles southwest of the 1600-acre area, to which he went between 5:30 a.m. and 7:00 a.m. on the 20th, one in the Calawah area, and the other at Hyas Ridge (Exh. 108), the wind was 35 to 45 miles per hour and "much stronger at times". He characterized the wind as "terrific"; and he was concerned that it would blow trees across the road so that he could not get out of the area before the fire reached him. This was the strongest wind he had ever seen on the Peninsula during a fire season (Tr. 3209-13, 3215, 3218-20, 3230-31).

In addition to this testimony, the fact that this wind caused the fire to blow through the air and spot at points three or four air miles distant is evidence of its unusual nature (Tr. 1604-5).

There is no evidence in the record to contradict the credible testimony of these eyewitnesses, or to show that any comparable dry east wind was known in this area during August or September for a period of many years preceding 1951. Annual fire weather reports for the State of Washington which were made by appellants' weather expert over a number of years between 1930 and 1947, failed to reveal any such serious east winds in September as are here described (Tr. 3340-41).

Neither is there any evidence in the record to show

that the combination of weather conditions which existed on September 20 was to be expected or was reasonably foreseeable. The weather readings at Snider Station for Wednesday, September 19, 1951, showed a Class 3, or just average, fire weather day (Tr. 3317). The last fire weather forecast for that day, which was made in the early evening, read as follows:

> Olympic—Mt. Baker Districts: Thursday: Patches of fog during early morning, otherwise high scattered to broken clouds. Little change in temperature. Humidity about 10% lower, with minimum near 30%. Winds northeasterly 12 to 16 exposed areas. (Exh. 44; Tr. 1596.)

Under accepted forecast terminology which has been standard since about 1933 (Exh. 104; Tr. 3325), the weather predicted was to be expected at the highest fire weather time, which was the middle of the afternoon on Thursday, September 20, 1951. Had the forecast been applicable to the night of September 19-20, the forecaster would have used the word "tonight" instead of "Thursday." In other words, the highest wind velocity of 16 miles per hour and the lowest humidity of about 30% were forecast to occur mid-afternoon on the 20th (Tr. 1596-7, 3322-3, 3379). From the forecast of fog one would assume saturated air at all levels in contact with the ground, a cool night, and no appreciable wind, since wind and fog do not occur together (Tr. 1594, 1596-7, 1938, 3322-3, 3379-80).

Normally, relative humidity goes up starting around 5:00 p.m. and reaches its highest point sometime in the early morning. Actual readings at Fibreboard Camp

One for the 17th of September showed humidity above 90% for 12 to 14 hours, and on the 18th around 90% for about 10 hours. There was nothing alarming therefore in the forecast on the evening of the 19th, and there was nothing whatever in it to indicate the weather conditions which occurred during the early morning hours of the 20th. But on the 19th, the humidity, after rising to about 70% at 9:30 p.m., dropped continuously after 10:00 p.m. until it reached its low point at midday on the 20th (Exh. 40; Tr. 2074-6, 3404-5, 3784-6, 4113-15, 4188); and at the same time the wind arose.

In sum, the district court was fully justified, if not required, to find that there was "an extraordinary concurrence of high temperature, low humidity and gale-force wind" (Fdg. XII, R. 233), and that such weather conditions were "unforeseeable" (Fdg. XVIII, R. 235-236).

II

Under the District Court's Findings, the Government's Negligence Was Not a Cause in Fact of Appellants' Damage

1. It is of course basic to the law of torts that an act of abstract negligence cannot support the imposition of liability: it must be shown that the damage complained of was proximately caused by the negligence. *Prosser on Torts* (2d ed., 1955), pp. 218-220. The Washington Supreme Court has defined proximate cause as "that cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the [damage], and without which that [damage] would not have occurred". *Squires* v. *McLaughlin,* 44 Wash. 2d 43, 47, 265 P. 2d 265; *Burr* v. *Clark,* 30 Wash. 2d 149, 157, 190 P. 2d 769.

That court has also indicated that, before any question of proximate cause can arise, it must be established that the negligence was the cause in fact. As it explained in *Eckerson* v. *Ford's Prairie School Dist. No. 11,* 3 Wash. 2d 475, 482, 101 P. 2d 345:

> There is, of course, a distinction between an actual cause, or cause in fact, and a proximate, or legal, cause.
>
> An actual cause, or cause in fact, exists when the act of the defendant is a necessary antecedent of the consequences for which recovery is sought, that is, when the injury would not have resulted "but for" the act in question. But a cause in fact, although it is a *sine qua non* of legal liability, does not of itself support an action for negligence. Considerations of justice and public policy require that a certain degree of proximity exist between the act done or omitted and the harm sustained, before legal liability may be predicated upon the "cause" in question. It is only when this necessary degree of proximity is present that the cause in fact becomes a legal, or proximate, cause.

This holding was quoted and applied recently in *Guerin* v. *Thompson*, 53 Wash. 2d 515, 335 P. 2d 36.

In this case, under these principles, the district court was not called upon to determine, and did not decide, whether the weather conditions existing on the morning of September 20 were an intervening, superseding cause or a concurring cause of appellants' damage. For, at that time, no negligence of the Government was operative for the weather conditions to supersede, or with which they could combine, to cause that damage.

This follows from the court's findings, discussed in Point I above, that (1) the condition of the P.A.W. right-of-way did not contribute to the start or spread of the fire; (2) the negligence of the United States in its initial attack upon the fire did not contribute to the presence of the fire in the 1600-acre area; and (3) there was no negligence on the part of the Forest Service during the mop-up operations in that area. What this means is that the presence of fire in the 1600-acre area on the morning of September 20 was in no wise attributable to any negligence of the Government; stated otherwise, there was no continuing risk created by any negligence of the United States in existence at that time.

2. In view of the foregoing, appellants' lengthy discussion of such concepts as continuing risk and intervening, superseding and concurring causes has no relevance here. All of appellants' arguments based upon these concepts presuppose what the district court has found as a fact *not* to have been established: that negligence on the Government's part was responsible for the presence of the fire in the 1600-acre area and, therefore, was an actual cause of the damage to their property. This is amply reflected by the fact that, in all of the cases which they cite, the defendant's negligence was an actual cause of the damage and the question was simply one of whether the actual cause was also a proximate cause. See *e.g. Johnson* v. *Kosmos Portland Cement Co.*, 64 F. 2d 193 (C.A. 6) (defendant's negligence in failing to clean an oil barge created a continuing risk of explosion which was touched off by lightning); *Theurer* v. *Condon*, 34 Wash. 2d 448, 209

P. 2d 311 (a fire hazard created by the negligent installation of an oil burner continued until the act of another concurred therewith to cause the damage); *Seibly* v. *City of Sunnyside*, 178 Wash. 632, 35 P. 2d 56 (defendant's negligence in failing to place a barrier or warning sign where it was burning materials along the highway concurred with another's negligence to cause plaintiff's damage); *Tope* v. *King County,* 189 Wash. 463, 65 P. 2d 1283 (negligence of the defendant in putting surface waters on land combined with an unprecedented flood to cause the damage); *Teter* v. *Olympia Lodge,* 195 Wash. 185, 80 P. 2d 547 (negligence of defendant in permitting wall of a burned out building to remain standing created a continuing risk with which wind concurred to cause plaintiff's damage); *Anderson* v. *Minneapolis, St. P. & S.S.M. Ry. Co.,* 146 Minn. 430, 179 N.W. 45 (defendant was responsible for a fire with which wind concurred to cause the damage).[12]

The same erroneous presupposition that governmental negligence was a cause in fact of the damage underlies appellants' argument on foreseeability, as well as the suggestion of appellant Rayonier (R. Br. p. 57) that the Government's position is that the United States should be exonerated because the damage was "too remote in time and space". Unless it is established that the negligence was an actual cause, foreseeability and remoteness, as these terms are used by appellants, do not enter the picture. Put another way,

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[12] See comment on this case in *Prosser on Torts* (2d ed., 1955, p. 221, fn. 19).

only after there has been a showing of actual cause must it be determined whether, in the words of the Washington Supreme Court in the *Eckerson* case, "this necessary degree of proximity is present that the cause in fact becomes a legal, or proximate, cause." See p. 56, *supra.*

While the district court did not articulate these considerations, it clearly recognized them. Its finding that the adverse weather conditions during the early morning of September 20 were extraordinary and unforeseeable was solely in the context of appellants' assertion that the Forest Service had been negligent during the mop-up period. Any doubt in this regard is dispelled by the discussion in the memorandum opinion (R. 199-201) of appellants' claim that Forest Service negligence during the night of September 19-20 led to the break out of the fire from the 1600-acre area. Further, the court's finding that the unforeseeable adverse weather conditions were the sole proximate cause of the damage was not based upon any theory that these conditions had superseded prior governmental negligence. Leaving aside the fact that there was no such negligence to be superseded as a cause, the court expressly stated in its memorandum opinion (R. 201) that it was not necessary to consider "whether the strong wind, the high temperature, the low humidity, or the concurrence of the three during the night in question, was an Act of God as that term is meant in law."

In sum then, virtually in its entirety appellants' proximate causation argument, as well as their contention that Judge Boldt misconstrued Washington law, rests upon a state of facts other than that found. On the facts as found, the negligence of the Forest Service was not a cause in fact of the damage since it did not contribute to the start of the fire; its spread to the 1600-acre area; or its flare up on September 20. Not being a cause in fact, it could not be a legal or proximate cause. *Eckerson* v. *Ford's Prairie School Dist. No. 11, supra.*[13]

III

The United States Had No Duty to Appellants to Maintain the P. A. W. Right-of-Way in a Fire-Safe Condition

While, in view of the above, we do not think this Court need reach the question, we submit that the district court's conclusion (R. 236) that the United States was negligent in failing to maintain the P.A.W right-of-way in a reasonably fire-safe condition was in error. In Washington, as elsewhere, one of the elements of actionable negligence is the existence of a duty to conform to a standard for the protection of others. *McCoy* v. *Courtney*, 25 Wash. 2d 956, 963, 172 P. 2d 596; see

[13] While it is unnecessary to discuss the point, we do not concede, of course, that, had the district court found that negligence on the part of the Forest Service had contributed to the spread of the fire to the 1600-acre area, that negligence could be regarded as the proximate cause of the damage. Since the fire was contained within the 1600-acre area, the sole proximate cause of the damage would still have been that factor which occasioned its flare up onto appellants' property—namely, the unexpected and unforeseeable adverse weather conditions. Cf. *Rayonier Incorporated* v. *United States*, 225 F. 2d 642, 644.

also *Prosser on Torts* (2d ed., 1955), p. 165. Insofar as the maintenance of the right-of-way was concerned, the United States had no such duty.

1. As this Court previously held in *Rayonier Incorporated* v. *United States,* 225 F. 2d 642, 646, the right-of-way held by P.A.W. was "at least equivalent to an easement". The record in this case fully supports this conclusion.

A strip of land 100-feet wide for a railroad right-of-way over and across, *inter alia,* Section 30, T 30 N, R 10 W., W.M., was conveyed to United States Spruce Production Corporation by warranty deed dated March 3, 1919 (Exhs. 3 and 4). As of March 31, 1937, the Spruce Corporation contracted with P.A.W. for the sale of all of its railroad property, under the terms of which contract P.A.W. had possession of the property with the enjoyment of all rights necessary to the carrying out of the contract, including especially the right of operating the property (Exh. 7). On May 3, 1938, P.A.W. filed a formal application with the Department of Interior, pursuant to the Right-of-Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. 934, for the grant to it of a permanent right-of-way for that portion of the railroad which crossed Government-owned lands; and on September 18, 1939, the application was approved (Exhs. 101 and 102). As required by the Right-of-Way Act and regulations issued thereunder, P.A.W. entered into two stipulations, one dated July 18, 1938 with the Department of Agriculture, Forest Service, and the other dated August 2, 1939, with the Department of Interior, National Park Service, covering, *inter alia,* obligations and responsibilities of the railroad respect-

ing maintenance of the right-of-way, fire prevention measures, and the reporting and control of fires starting thereon (Exhs. 10 and 11). On November 30, 1946, the Spruce Corporation assigned and transferred to the United States all of its right, title and interest in and to the contract between it and P.A.W. (Exh. 8); and on the same date conveyed to the United States the railroad, including the real property (Exh. 5).[14]

With respect to rights-of-way grants under the Act of 1875, the United States Supreme Court in *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262, held unequivocally that railroads enjoy an easement on their rights-of-way on Government lands. In *Himonas* v. *Denver & R. G. W. R. Co.,* 179 F. 2d 171, the Tenth Circuit followed this holding.

2. Since P.A.W. had an easement on the land over which the railroad ran, the United States had no common law obligation to maintain the right-of-way in a reasonably fire-safe condition. That duty was upon the railroad which enjoyed the easement and, upon the railroad's failure to perform it, the railroad alone was liable to third persons for injuries resulting therefrom. *Reed* v. *Allegheny County,* 330 Pa. 300, 303, 199 Atl. 187. See also *Pittsburgh, Cincinnati & St. L. R. Co.* v. *Jones,* 86 Ind. 496;[15] *Herzog* v. *Grosso,* 41 Cal. 2d 219, 259 P. 2d 429; 2 *American Law on Property,* § 8.66; *Jones on Easements* (1898), § 831.

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[14] This conveyance contained the recital quoted *supra,* pp. 8-9.

[15] In rejecting the railroad's argument in this case that, since it held only an easement it could not be liable to the plaintiff who held the fee, the court pointed out that the parties stood in the relationship of landed proprietors bordering on each other (at p. 499).

There are no Washington decisions specifically passing on this point. However, as this Court implicitly recognized in its earlier opinion, this is no reason to believe that Washington would not accept this principle. It is to be noted that, under Washington law, where a railroad fails to maintain its right-of-way in a reasonably fire-safe condition and a fire is started thereon by one of its locomotives, the railroad is accountable for resulting damage to adjoining property owners. See *Abrams* v. *Seattle & M. R. Co.*, 27 Wash. 507, 68 Pac. 78; *Firemen's Fund Ins. Co.* v. *Northern Pacific Ry. Co.*, 46 Wash. 635, 91 Pac. 13; *Slaton* v. *C. M. & St. P. R. Co.*, 97 Wash. 441, 166 Pac. 644; *Jordan* v. *Spokane, Portland & Seattle Ry. Co.*, 109 Wash. 476, 186 Pac. 875. This is also the rule applied in virtually every other jurisdiction. See cases cited 18 A.L.R. 2d 1090, *et seq.*, 111 A.L.R. 1146, *et seq.*, 42 A.L.R. 799, *et seq.* In none of these cases imposing liability on the railroad in possession was there the remotest suggestion that liability might also be imposed upon the holder of the fee.

Nor did the reservation of a right of entry by the United States for purposes "not inconsistent with the enjoyment of said right of way by the [railroad], its successors and assigns,"[16] affect the application of

[16] Exhs. 10 and 11. It does not appear, as found by the district court (Fdg. III, R. 229) that there is any provision in the conditional sales contract (Exh. 7) giving the Government a right of access to fight fire on the right-of-way and to abate fire-hazardous conditions thereon. Such rights of entry as the Government may have had for this purpose must be found, if at all, by implication from the provisions in these stipulations executed in connection with the grant of the permanent right-of-way by the Secretary of the Interior.

these legal principles. For the United States to be liable to third parties for the condition of the right-of-way, the Government must have assumed the obligation to maintain it. 225 F. 2d at p. 646. This it did not do. The right reserved was solely for the benefit of the Government; it was not coupled with any undertaking by the United States to maintain the right-of-way; and it was in no sense equivalent to an assumption of such an obligation. On the contrary, the stipulations entered into between the Government and the railroad placed this obligation squarely upon the railroad.[17] In these circumstances, third persons suffering injury resulting from failure to maintain the right-of-way must look to the railroad for damages. Cf. *The Dalles City* v. *River Terminals Co.*, 226 F. 2d 100 (C.A.

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[17] The stipulation with the Forest Service (Exh. 10) required the railroad, *inter alia:*

> 7. To prevent the spread of fire originating on the Applicant's right of way, or through its agency or neglect, and/or if it fails to do so, to reimburse the Forest Service for money necessarily expended in preventing the spread of such fires; * * *
>
> * * * * *
>
> 8. To clear and keep clear of any timber and other inflammable substances, all of said right of way, all other lands owned or controlled by the Applicant as a right of way however acquired, lying between the points where the center line of said right of way intersects said Forest boundaries, and all lands of said Forest within 200′ of said centerline; * * *
>
> * * * * *
>
> 12. To cut all snags over 15′ in height 12″ D.B.H. within 150 feet of center line. To clear and keep clear for a distance of 2 to 4 feet beyond end of ties, the grade to mineral soil in a manner satisfactory to the Forest Officer in charge.
>
> 13. To burn inflammable material accumulating during construction or maintenance within 25 feet on each side of the track in the discretion of the Forest Officer in charge.

9); *Miles* v. *Spokane, Portland & Seattle Ry. Co.*, 176 Ore. 118, 155 P. 2d 938.

Neither did the Cooperative Agreement between the United States and the State of Washington for the protection of lands within the specific areas designated place any obligation upon the United States to maintain the railroad right-of-way. This was essentially a fire-fighting agreement; and it is devoid of any provision which could reasonably be construed as placing upon the Government the duty to go upon private lands within its protective area and abate fire hazards as part of its fire protection duties thereunder.[18]

As the district court recognized, there is no clear-cut decision holding the owner of a servient estate liable under any Washington statutes for the abatement of a fire hazard created by and existing on the dominant estate (R. 192). To bring the United States in this case within the ambit of R.C.W. §§ 76.04.350 and 76.04.370, which were cited by the court, it would be necessary to show that where these statutes refer to the "owner" of land they mean the holder of the servient estate where a fire hazard exists on a right-of-way. There is nothing in the statutes to so indicate, and none of the Washington cases cited by the district court or appellants so construe them.[19]

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[18] It is to be noted that Forest Service officials did request P. A. W. on numerous occasions to clear the right-of-way and to maintain it, but because of financial difficulties the railroad did not carry out these obligations. See Exhs. 19-23, inclusive.

[19] *Swan* v. *O'Leary*, 37 Wash. 2d 533, 225 P. 2d 199, was a quiet title action in which the court held that the grant of a right-of-way, although made by deed, gave an easement which, upon abandonment, reverted to the successors of the original owners of the lands.

On the other hand, a decision of the Washington Supreme Court lends support to our position that these Washington statutes imposed a duty only upon the railroad with regard to the condition of the right-of-way. In *Great Northern Ry. Co.* v. *Oakley,* 135 Wash. 279, 237 Pac. 990, the receiver of a logging company which had a contract for logging certain lands disclaimed any liability for damage caused by slash fires originating on such land. The holder of the title to the lands contended that the insolvent logging company, and therefore its receiver in possession, was responsible under the predecessor to § 76.04.370 for abatement of the slash and for any damages caused by fire originating therein. The court agreed, holding that the receiver in possession was the "owner" within the contemplation of the statute, or in any event he was the "person responsible" for the existence of the slash and as such was liable. This decision strongly suggests that were the Washington Supreme Court squarely

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In *State of Washington* v. *Canyon Lumber Corp.,* 46 Wash. 2d 701, 284 P. 2d 316, the court read Section 76.04.370 as applying to those who, unlike the Government with respect to this right-of-way, had possession of the land on which the combustibles allegedly existed; and the court gave no consideration to the question of whether third persons had any rights of recovery for fire loss beyond their rights under the common law. Likewise in *Prince* v. *Chehalis Savings & Loan Assn.,* 186 Wash. 372, 58 P. 2d 290, there was no question of who was the "owner" of the land under the statute, the court simply holding the undisputed owner of the land liable for fire which spread from combustibles on his property to the damage of others. In *Northern Pacific Ry. Co.* v. *Mentzer,* 214 Fed. 10 (C.A. 9), the court held that the Northern Pacific, which permitted another company to use its tracks, was jointly liable for a fire started directly upon the plaintiff's property by sparks from the using company's engine, since under the law governing common carrier railroads the Northern Pacific was responsible for any unlawful or wrongful operation of the road.

confronted with the question, it would hold that the owner of the easement in possession, rather than the holder of the fee out of possession, is liable for damages resulting from a fire-hazardous condition on the right-of-way.

Section 76.04.380, which was also cited by the district court (R. 192), is a fire-fighting statute, and additionally it becomes operative only upon notice. Thus it has no applicability here. In any event, this section, no more than the other statutes, purports to change the common law, under which the United States had no duty to maintain the right-of-way.

It is not entirely clear whether either of the appellants is contending that the Government is liable under R.C.W. § 76.04.450 for the condition of the right-of-way. The district court does not mention this statute in connection with any duty on the part of the United States, and appellants Arnhold appear to use it only in connection with their argument respecting Fibreboard liability (A. Br. pp. 55-56). Appellant Rayonier asserts (R. Br. p. 12) that the Government "had duties imposed" by this section. However, since the United States did not "do any act" on the right-of-way which exposed the forest to a fire hazard, the statute is in terms inapplicable to it in this case.

Contrary to the district court's apparent belief (R. 193), this is not a situation where the United States, otherwise liable to third parties, attempted to absolve itself by placing the obligation of maintenance upon the railroad under the stipulations noted above. The United States had no duties with respect to the right-of-way other than the negative one of not interfering

with the railroad's use thereof. The obligation of maintenance was in law that of the railroad from the time it acquired its easement.

It follows that since the United States had no duty at common law, under the Cooperative Agreement, or under Washington statutes to maintain the railroad right-of-way in a reasonably fire-safe condition, the district court erred as a matter of law in finding it negligent in this respect. We stress again, however, that, in light of the district court's finding (XIII) that it was not established that the condition of the right-of-way caused or contributed to the spread of the fire, we do not believe this Court will need to consider the matter.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed.

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No. 16367

United States Court of Appeals
For the Ninth Circuit

ARTHUR A. ARNHOLD, *et al., Appellants,*

vs.

UNITED STATES OF AMERICA; PORT ANGELES & WESTERN RAILWAY COMPANY, INC., a Delaware corporation; FIBREBOARD PRODUCTS, INC., a Delaware corporation, and A. R. TRUAX, Trustee in Reorganization, *Appellees.*

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HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE FIBREBOARD PRODUCTS, INC.

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HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE FIBREBOARD PRODUCTS, INC.

JURISDICTION

Jurisdiction of the court as to Fibreboard, Inc. is derived from 28 U.S.C. 1332 *Diversity of Citizenship* (R. 354).

QUESTIONS INVOLVED AS TO APPELLEE FIBREBOARD

1. Was the defendant Fibreboard negligent in relying on fire fighting action of the Forest Service and in failing to take independent action in fighting the August 6, 1951, fire and in failing to supplement such ac-

tion in confining and suppressing the fire after it reached Fibreboard land?

2. Was Fibreboard negligent in failing to abate or procure clearance certificates for logging slash in a Fibreboard area logged in 1946 and 1947 through which the fire of September 20, 1951, burned before going onto the plaintiffs' lands and property?

3. Was any claimed negligent act or omission of Fibreboard a contributing, proximate cause of the Forks fire of September 20, 1951?

The trial court disposed of the first two questions by its memorandum decision (R. 188) and specifically in its original finding XIV (R. 212) and its identical amended finding XV (R. 234). It found that "plaintiffs did not show by a preponderance of the evidence that defendant Fibreboard failed to use ordinary care in any of the particulars of negligence alleged by plaintiffs" (R. 234).

Having found no negligence on the part of Fibreboard, no specific finding was made on the question of whether any alleged act or omission of Fibreboard could have been the proximate cause of the September 20th fire.

The court did find in amended finding XVIII that "the sole proximate cause of the damages to plaintiffs in the amounts stipulated herein was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951."

STATEMENT OF THE CASE

This appellee generally accepts appellant Arnholds' statement of the case, subject to certain corrections and modifications. While Ranger Floe had called Fibreboard's timekeeper at Camp No. 1 and asked him to tell the PAW crew to return the engine to the fire sighted at 12:30 (Tr. 535, 536, 537) there is no evidence that Fibreboard knew or had any reason to know of the Heckleville fire until Floe called Fibreboard at 2:40 p.m. on August 6 for men and equipment from Fibreboard (Tr. 565). At all times subsequent to the request made by Floe for men and equipment from Fibreboard on August 6, Fibreboard did everything Forest Service asked of it and made it clear that regardless of "who paid," Fibreboard was at the command of the Forest Service (Tr. 889, 890). Fibreboard was "most cooperative" (Tr. 4070). The following statement on page 13 of appellants' brief should be modified and corrected:

> "The fire escaped first into slash on the Government's land (Tr. 3527) and then into slash on Fibreboard's land" (Tr. 2011, 2012).

Actually there was a 1500-foot strip of 65-year-old, green timber on Fibreboard land adjacent to the slash on the Government's property from which the fire spread onto Fibreboard's land (Tr. 2012, 3477, 4488). Fibreboard's holdings in the 1600-acre area in addition to the strip of green timber above mentioned, consisted of some burned and cleared acreage as well as some unburned area. Some of this area had been previously burned in 1938 and 1945 by uncontrolled slash

fires. These fires had been suggested by the governmental agencies (Tr. 2088).

On page 14 of appellants' brief, Amended Finding XV is referred to (R. 234, 235) as being a finding that Floe and his subordinates were in some respects remiss in connection with the Heckleville fire. Actually Amended Finding XV referred to, is identical with Finding XIV, both of which provided that there was no negligence of any kind on the part of Fibreboard. Fibreboard cannot adopt the statement made on that page that there was evidence that Floe was negligent in the manner asserted.

We also challenge the statement on page 17 that the September fire "spread first into the three quarter sections of Fibreboard slash south and west of L-1." There is substantial evidence that the September 20 fire first started burning at a point outside of the 1600-acre area approximately 400 feet to the northeast of L-1. Certificates of clearance had been issued covering this area. It was grown up with small green timber (Tr. 4300, 4443, 4444, 4513).

FIBREBOARD'S SUPPLEMENTAL STATEMENT OF THE CASE

Two cases have been consolidated for the purpose of trial and appeal (Tr. 2084, 2085). Fibreboard is an additional defendant in the *Arnhold* case only. These plaintiffs claim that Fibreboard was negligent in relying on the fire-fighting action of the Forest Service and in failing to supplement the action of the Forest Service by independent action as distinguished from

the "full cooperation" extended to the Forest Service by Fibreboard at all times pertinent to this inquiry. This cooperation consisted of the furnishing of men and equipment requested by the Forest Service. Plaintiffs Arnhold refer to certain alleged independent action taken by Fibreboard, but claim that Fibreboard should have taken more independent action. This claim is made regardless of the fact that Fibreboard was conducting itself in a manner consistent with the fact that the Forest Service had assumed control of all fire-fighting activities (Tr. 636, 889, 890).

By 5:00 p.m. on August 6, two Fibreboard bulldozers were on the Heckleville fire which had been requested by the Forest Service. On the morning of August 7, 1951, all of the Fibreboard's logging crew, who had been logging on the early morning shift because of dry weather conditions, went to work on the fire under supervision of the Forest Service (Tr. 886).

Fibreboard's conduct and cooperation from August 6 to September 20 was approved and highly commended by the Forest Service at the time of the trial (Tr. 4074-4079).

SUMMARY OF ARGUMENT

First: There is no common law duty imposed upon Fibreboard for alleged failure to fight a fire spreading upon its land from the land of another. Under common law, a landowner in the position of Fibreboard is not liable to third parties for failure to fight such a fire.

Second: RCW 76.04.380 providing that the owner of

land "on which a fire exists shall make every reasonable effort to control and extinguish such fire immediately after receipt of written notice to do so from the warden or ranger" was not operative as Fibreboard never received such a written notice.

THIRD: Fibreboard did make "every reasonable effort to control and extinguish" the fire that came upon its lands by fully cooperating with the Forest Service professional firefighters.

FOURTH: RCW 76.04.370 and RCW 76.04.450 and other Washington fire-fighting slash statutes found in RCW Title 76; Chapter 76.04 pertaining to logging debris, set up no standards of care and create no civil liability. The penalty provided is reimbursement to the State for expense incurred by it in fire-fighting activities.

FIFTH: The trial court's finding that Fibreboard did not violate the fire-fighting statutes was proper.

SIXTH: The trial court's findings that the "sole proximate cause of the damages to the plaintiffs . . . was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951," is equivalent to a specific finding that the presence of slash on Fibreboard land was not the proximate cause of the plaintiffs' damages.

SEVENTH: Even if it be assumed for the purpose of argument, as contended by appellants Arnhold, that RCW 76.04.370 the "Abatement of fire hazards—Recovery of cost" statute and RCW 76.04.450 the "Olym-

pic Peninsula area protection" statute "impose standards of care, the violation of which is negligence *per se*" (Appellants Arnhold's brief, page 56), such an alleged violation was not the proximate cause of the fire of September 20, 1951.

The trial court so found and its finding is supported by the preponderance of the evidence.

ARGUMENT

Prior to the trial "at the instance of counsel for all parties and in their company, the court made an extensive two-day tour of the entire area of the fire, visiting and inspecting every place of particular significance later referred to in the evidence" (R. 172-173). After many weeks of trial, during which over 4,600 pages of testimony were taken, Judge Boldt took the cases under advisement and "spent hours and days wandering over these cases and over the transcript and over the circumstances of this case and I had the maps laid out in my library for weeks on end examining this situation" (R. 282). In the memorandum decision that followed, the court took the unvarying position that "the evidence does not support a finding of negligence in any particular . . ." in connection with the plaintiffs' claim that Fibreboard was negligent in relying on the firefighting activities of the Forest Service. It also refers to the plaintiffs' claim that Fibreboard should have taken independent action and thus supplemented the activities of the Forest Service.

The court called attention to the fact that it had

found the Forest Service negligent in its firefighting action during the initial period, August 6-10, in which interval the fire reached Fibreboard's lands and further stated, "It does not appear that a reasonably prudent land owner in the situation of Fibreboard under the same or similar circumstances would have recognized the inadequacies of the Forest Service's action or if so, that such land owner exercising reasonable care would have felt authorized or obliged to intervene and to interfere in any particular with the Forest Service's supervision and control of the firefighting" (R. 189).

Although the court in the memorandum decision referred to the negligence of the Forest Service as being from August 6 to 10, the court subsequently entered Amended Finding XVII, finding that the plaintiffs did not show "that defendant United States failed to use reasonable care in mop-up or other firefighting activities after August 7 . . ." (R. 235). Thus it would appear that if Fibreboard was to have recognized the inadequacies of the Forest Service, it would have been forced to do so on August 6 and 7, the dates that the fire was being fought on railroad and government lands, when the fire was active and when it was, as it was at all times, under the complete command and control of the Forest Service. To hold that Fibreboard should have recognized any so-called inadequacies of the Forest Service at that time, or any other time, and should have intervened, would have called for a finding wholly unsupported by the evidence.

In disposing of the plaintiffs' claim that Fibreboard was negligent in not disposing of the slash on its lands

in the vicinity of the 1600-acre tract or in the alternative procuring State clearance certificates on such slashed lands, the court stated that "under the circumstances, indisputably shown by the evidence," such a finding of negligence in that regard could not be made. The court further commented that it could not adopt the plaintiffs' contention that under the Washington statutes a landowner in the position of Fibreboard "is absolutely liable irrespective of negligence or damage to other landowners caused by fire emanating from, even though not originating on, such slashed land." The court further commented that in its opinion the Washington State Legislature in enacting the fire fighting statutes relied on by the plaintiffs Arnhold did not intend to provide "for absolute liability of the owner of land containing logging slash under the particular circumstances" of a landowner in Fibreboard's position.

However, appellants Arnhold on page 56 of their brief state that the rule of liability to be applied is not one of liability without fault but the liability of conduct proscribed by statute. They further state that the statutes impose standards of care, the violation of which is negligence *per se*. We submit that there are no standards of care set up by the statutes. They are penal in form; and the penalty is the reimbursement by the landowners of the expenses of the State incurred by it in fighting the fires. The statutes further provide the method of the State's recovering the expenditures thus incurred.

State v. Canyon Lumber Corp., 46 Wn.(2d) 701, 284 P.(2d) 316.

As pointed out by this court in *Arnhold v. United States,* 225 F.(2d) 649:

> "No liability is placed on the landowner, with or without written notice to third parties where public fire fighters take inadequate measures in their attempt to subdue the blaze."

The trial court, as indicated in its memorandum decision and finding in behalf of Fibreboard, refused to take the position that these statutes fixed an absolute liability on the landowner. Reasonableness of the conduct of Fibreboard was amply supported by the evidence. Even under the theory advanced by appellants Arnhold on page 56 of their brief that the liability is for conduct proscribed by statute and that the violation thereof is negligence *per se,* the landowner would have a right to show the reasonableness of his conduct. However, it is clear that the Washington legislature did not mean to create a civil liability by enacting the fire fighting statutes referred to.

But even if we assume for the purpose of this argument that there was a violation of the slash statute by leaving unburned slash on this appellee's lands and that such violation was negligence *per se* as contended by appellants Arnhold, there was still no showing that such a claimed violation was the proximate cause of the fire of September 20. It is a well-established rule in Washington that although the violation of a positive statute may be negligence, there can be no liability because of such negligence unless the violation of a positive statute or ordinance is the proximate cause of the plaintiffs'

injuries. As was said in *Berry v. Farmers Exchange of Walla Walla,* 156 Wash. 65, 286 Pac. 46:

> "That violation of an ordinance, generally speaking, is negligence, there can be no dispute, but the law is well settled that there must be a causal connection between the negligence arising from the violation of the ordinance and the accident itself, before a cause of action arises from such violation." (Citing cases)

The *Berry* case involved the violation of a city ordinance requiring fire escapes on apartment houses.

It should be noted that the trial court at all times took the unvarying position that there was no liability so far as Fibreboard was concerned. Its memorandum decision so far as alleged Fibreboard liability is concerned was never changed or altered. Its finding that Fibreboard was in no manner negligent was never changed or altered except by number which was occasioned by the filing of the amended findings pertaining to other defendants. The validity and soundness of the court's firm position that there was no liability shown on Fibreboard may have been reflected by comment of one of appellants' counsel during one of the post-trial arguments when he said: "I know Your Honor has given this matter a whole lot of thought and for that reason I am not going into this Fibreboard situation at all. You found no negligence there and I don't want to waste your time raising it" (R. 286). The validity of the court's position as to the non-liability of Fibreboard and particularly referring to whether or not it should have recognized any alleged inadequacies of the Forest

Service on August 6th and 7th is again reflected in the court's memorandum decision where it said: "During the course of the fire fighting, both on the right of way and thereafter, a number of highly competent and experienced forest fire fighters were on the scene as participants or observers. There is no evidence that at any time during the long battle any of these experts or any representatives of any plaintiff or anyone else interested in protecting life and property then in jeopardy either condemned, criticized or offered suggestions concerning means or method used in fighting the fire" (R. 188). Even during the trial in ruling on Fibreboard's motion to dismiss at the close of the plaintiffs' case, the court said: "Well, I must say that the motion certainly presents very serious questions which, of course, have crossed my mind as the case progressed . . . " "It seems to me that in the circumstances of this particular case the best interests of all concerned will be if I more fully hear all that is to be said on this subject when all of the evidence on liability has been submitted. Accordingly, the motion will be denied . . . " (Tr. 3258, 3259).

In referring to the duties of the landowner on whose land the fire of August 6 started, the trial court said:

> "As indicated in the applicable principle of law earlier stated herein, with knowledge of a fire on its right of way, whether caused by its engine or not, PAW had the duty to exercise reasonable care to confine and suppress the fire. However, if it appeared to PAW in the exercise of reasonable care that experienced, competent fire fighters were in charge of the fire and apparently taking every reasonable measure to confine and suppress the

fire, the mere fact, long later determined, that the fire fighting was inadequately or imprudently performed, would not justify finding PAW negligent." (R. 188)

Obviously, this statement or principle applies with equal or greater force to Fibreboard on whose land the fire spread as compared to appellee PAW upon whose land the fire originated.

What, If Any Common Law or Statutory Duty Was There on Fibreboard Upon Whose Land the Fire Spread?

Fibreboard was not responsible for the start of the August 6 Heckleville fire and was not responsible for its spread onto its portion of the 1600-acre tract. We, like this court, in *Rayonier, Inc. v. United States,* 225 F.(2d) 642, have been unable to find a decision holding a landowner liable for the spread of a fire which did not originate on its property. In that case this court said:

". . . We fail to find a case wherein a landowner was held liable to third parties for failure to fight a fire spreading across his land from the land of another. Cases cited by appellant deal with the duties of a landowner on whose property the fire broke out. To hold an intermediate landowner liable for damage to property caused by fire passing over his land to all parties subsequently damaged notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule."

A simliar statement was made in *Capra v. Phillips Ins. Co.,* 302 S.W.(2d) 324, in connection with a fire

which commenced on the plaintiff's land. That court pointed to the fact that no case was cited by the plaintiff which holds a defendant liable for a fire originating on the plaintiff's land. It is significant that with the numerous decisions on forest fires that no decision is pointed up basing liability for the spread of a fire originating outside the landowner's property. Most if not all of the decisions concerning liability for spread of fire are found in the following annotations:

21 L.R.A. 255;
42 A.L.R. 783;
111 A.L.R. 1140;
18 A.L.R.(2d) 1081.

Fibreboard Received No Notice to Make Reasonable Effort to Control Fire That Spread Onto Its Lands As Required by R.C.W. 76.04.380

Washington statute RCW 76.04.380 declares an uncontrolled fire and one without proper action being taken to prevent its spread is a public nuisance. The statute then provides that the owner of land "on which a fire exists . . . shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the warden or ranger." If the landowner does not proceed to abate the nuisance, then the fire warden does so at the expense of the landowner. Payment of the forest patrol assessment relieves the landowner of any responsibility under this statute unless he is guilty of negligence in the starting of the fire or there is "extra debris" as defined in the slash statute. We submit that this statute

does not give rise to a civil liability. If it does, then the duty is to make "reasonable effort to control and extinguish" after notice. All that the statute requires of the landowner in abating this nuisance is to "make every reasonable effort" as requested by the fire warden and where the fire is "uncontrolled and without proper action being taken to prevent its spread." The penalty imposed by the statute is the assessment of the cost incurred by the fire warden or forest ranger in abating the fire. The payment of 8¢ an acre forest patrol, fire protection assessments referred to in the statute had been made by Fibreboard (Tr. 3502).

If proper care of the fire is being taken by the Forest Service, then certainly there is no other duty imposed by the statute. At most, this duty is simply reasonable care under the circumstances and is not an absolute liability. It follows that the statutory obligation, if there is one, gives rise to nothing greater than common law if there is a common law duty. This state is committed to the rule of law that where a fire starts on the property of a landowner he must exercise care to prevent its spread.

> *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200.

As previously pointed out and as stated by this court in *Arnhold v. United States*, 225 F.(2d) 649, this rule does not extend to a landowner such as Fibreboard upon whose property the fire has spread. ~~Remington's Revised Statute~~ RCW 76.04.380 does not change the common law so as to impose liability upon a landowner upon whose land the fire spread. The duty of making every

reasonable effort to control and extinguish such fire becomes operative only "after receiving written notice to do so from the supervisor or a warden or ranger; . . ." Fibreboard was never served with such a written notice or request (Tr. 2300). The statute further provides a penalty on the landowner on whose land the fire spreads for failing to comply with such a notice and the penalty is recovery of costs by the public firemen from such landowner. In face of the fact that Fibreboard was never served with such a written notice, we submit there was no common law or statutory duty upon this appellee to suppress the fire that had spread upon its lands. It did, however, cooperate with the Forest Service in fighting the fire. The latter duty, if it existed, was not imposed by common law or statute in the absence of the required statutory notice.

Nevertheless, the court found in its memorandum decision and its finding was abundantly supported by the evidence, that Fibreboard did make "every reasonable effort to control and extinguish such fire."

The question then is whether or not Fibreboard used reasonable effort under the circumstances of this case to suppress the fire. Fibreboard, in fully cooperating with the Forest Service, used "every possible effort and every available man" to suppress the fire. The court's analysis of the facts in *Walters v. Mason Co. L. Co.*, 139 Wash. 265, 246 Pac. 749, applies to Fibreboard in the instant case.

> "Under all the evidence in the case, respondent, the fire wardens and even appellant himself used every possible effort and every available man to

> suppress the fire. . . . Disregarding the question of whether there was an intervening cause by reason of the high wind that appears to have been blowing on Sunday forenoon, we are of the opinion that on the question of negligence this case falls within the rule of *Lehman v. Maryott and Spencer Logging Co.,* 108 Wash. 319, 184 Pac. 323, and *Stephens v. Mutual Lumber Co.,* 103 Wash. 1, 173 Pac. 1031."

Like the *Walters* case, the *Stephens* case and the *Lehman* case, cited by the court, this case involved instances where the fire fighters assumed that the fire was under control.

Fibreboard's Cooperation with Highly Skilled Forest Service Fire Fighting Organization

It is apparently agreed by appellants Arnhold "that Fibreboard could not interfere with Forest Service management of the fire . . ." (Appellants Arnhold brief, page 52). Nevertheless, the question of whether or not Fibreboard should have taken action independently of the Forest Service cannot be completely divorced from the fact that its cooperation was requested and given to the Forest Service. It will be remembered that Fibreboard had no knowledge of the existence of the Heckleville fire until called by Floe at 2:40 p.m. on August 6 (Tr. 565).

Independent Action by Fibreboard

Fibreboard extinguished one fire on August 6 (Tr. 548). One of its men hauled Forest Service men to a certain junction toward the fire on August 6 (Tr. 1047).

It put in certain trails and roads during the mop-up period after discussing this with Floe (Tr. 2051 ,2052). Mr. Floe said that Fibreboard's action on August 6 was proper:

"Q. . . . In regard to the fire of August — let's start it on August 6, I will ask you whether or not it was the general practice for a timber owner and operator such as Fibreboard at that time and place to have taken independent action to suppress or stop, extinguish the fire that started or fires that started on August 6, 1951, on the railroad right of way independent of your action? By you, I mean Forest Service action.

A. No.

Q. Would you tell us why? Just explain briefly if you would.

A. Well, it was on government land and not immediately accessible to them. If they had seen it, perhaps, before and wondered whether it had been reported or not, they probably would call me and ask me about it, or if they could do anything, but under the circumstances, my belief, they were gone before the fire was reported, and there wouldn't be no way for them to see the fire in their ordinary route of travel.

Q. And after it was reported to your office, would you expect them to conduct business in a normal and usual manner—expect Fibreboard to go out and take independent action after you had a report on it?

A. No." (Tr. 4420)

Fibreboard's Action on August 6 Was Proper (Tr. 2511, 2868, 4394)

Fibreboard complied with all requests of the Forest Service and stayed on the August 6 fire "as long as needed" (Floe, Tr. 665). Mr. Floe consistently testified throughout the trial that Fibreboard cooperated fully and did everything that could have been expected of it. His testimony on this point is demonstrated as follows:

> "Q. Did . . . Fibreboard . . . tell you that in effect their organization was at your service and your command?
>
> A. Yes, they have always told me that.
>
> Q. And they did, on this occasion, during this fire?
>
> Yes.
>
> Q. It is a fact, then, I assume, that Fibreboard gave you their full and whole-hearted cooperation in fighting this fire from the very inception of the fire until the end of it, isn't that right?
>
> A. That is right." (Tr. 889-890)

Mr. Leslie Colvill, one of Mr. Floe's superiors in the Forest Service, said that Fibreboard did everything that was or could have been expected of it by the government in the following testimony, the first portion of which refers to a meeting of Fibreboard and the Forest Service concerning payment of Fibreboard's men after fire went on to its land:

> "Q. Now, as far as this meeting is concerned, I will ask you whether or not there was anything that occurred there that in any way led you to be-

lieve that Fibreboard was not perfectly willing and able to do everything in its power to co-operate with the Forest Service regardless of any discussion you may have had as to how the men would be paid or—

A. They were most co-operative.

Q. Would you tell us, please, what you mean by that, Mr. Colvill?

A. Well, first, the willingness with which they agreed to pay their men was one thing. I in my work have a lot to do with trouble shooting. I call it, and I really expected some trouble because in a case of that kind, the operators want us to take up their men, generally, on our payroll, and one of the reasons they give me is because of accidents that may occur while they are on this kind of a job. Then, of course, comes the pay scale, which is usually different, and that brings on problems.

Q. In other words, the fire-fighting scale will be lower than Fibreboard's rate?

A. Yes, so that willingness to co-operate with us without any argument at all more than that one statement pending this determination was certainly an act of willingness to co-operate. Likewise, in giving us their men, that is, placing them at our disposal, and equipment without any questions so that we had full control was cheerfully done.

Q. And I was going to say, did they actually do that, tell you that their men were at your disposal and their equipment?

A. Yes.

Q. And was it understood, sir, to the best of your knowledge, that the equipment and men of Fibre-

board were at the Forest Service's disposal and to be directed by the Forest Service?

A. To the best of my knowledge, yes.

Q. What would you say as to whether that is the proper and usual and customary procedure for a land owner or timber owner such as in Fibreboard's position at that time, whether or not that is the usual, and I guess I said customary practice to follow in that case?

A. Yes, it is the customary practice.

Q. Now, in view of the co-operative agreement and the general situation there, which I won't go through and repeat again, would it have been proper for the Fibreboard Company or any other private individual or corporation to go in and do independent things that might or might not be inconsistent with the general over-all plan of the Forest Service in connection with the suppressing and fighting of this fire?

A. I think it would have complicated the situation and made control slower and more difficult if we had to negotiate all of the various little areas in which a company might elect to want to do the work instead of us. I can't imagine a situation like that. We don't have them.

Q. It would be bad?

A. It would be bad.

Q. Now, is it a fact that the Forest Service did assume control of this fire from its inception?

A. Yes.

Q. Under that situation you feel, or do you, that Fibreboard operated properly from (the) time of the beginning of this fire on August (6)?

A. Yes.

Q. In working with the Forest Service?

A. Yes.

Q. Now, getting over to the period during the mop up and latter end of it in September there, what would you say as to whether Fibreboard acted in the usual and customary manner, in proper manner, in still keeping its tanker there at Camp One subject to the National Forest's direction and having its crew over on Tom Creek logging subject to, of course, to the Forest Service calling them if they wanted them? What would you say as to whether or not that was usual and customary and proper practice?

A. I think this was proper and customary.

Q. And what would you say, sir, as to whether or not Fibreboard would or would not have been proper had it under the circumstances, would it have been usual and customary if it had attempted to interfere and overrule, if you please, Forest Service in connection with the mop up and decisions of whether there should or should not be patrol on, say, the last week before September 19 and 20?

A. I think such action would have been improper.

Q. And why?

A. And not customary.

Q. And why would it have been improper, Mr. Colvill? Just briefly tell the Court.

A. Well, we were in charge of the fire, and we knew where we wanted action. We had the complete picture. If we wanted the tanker here, and you

boys were employing that tanker some place else, it wouldn't have been available to us, your tanker. I am referring to Fibreboard's tanker. It would have been a divided responsibility, and we could not have cooperated to the same extent. It would have changed our plans materially because our action was governed in a large measure on what Fbreboard had, and particularly their men in the proximity of their camp to the fire area. By their camp, I mean the logging operation, not the camp, but where they were logging, and so that in deciding on the number of men that we wanted to employ, we were guided in a large measure by the fact that we would—could call upon Fibreboard men, and we would have them there. It was something like 30 minutes we figured that we could have additional men, and that had a bearing, then, on our action, and the number of men we would have to employ. Now, if that cooperation was taken away from us, it would have affected our plans.

Q. Actually, now, I have asked you quite a few questions about what the contemplation was. Actually, did Fibreboard cooperate fully throughout the entire history of this fire from August 6 to September 20, and thereafter as far as that is concerned?

A. Yes, they did.

Q. To the satisfaction of the Forest Service, Mr. Colvill?

A. Yes.

Q. In that connection, what would you say as to whether or not the—or land owner within the area of this particular co-operation agreement, and I suppose others, actually has as great a knowledge and expertness in connection with fire fighting and

suppression as your own good organization? By that I mean the Forest Service.

A. In my experience, the know-how is much greater with Forest Service than it is with logging operations. Occasionally, such as the one or two men that have been mentioned at the trial that were employed by logging operations, are well qualified, but generally, that is not the case. We are better qualified by know-how, experience and fighting fire than logging companies.

Q. And does it follow that you have, of course, highly equipped scientific gadgets and information, I suppose?

A. Yes.

Q. In connection with fire fighting and suppression?

A. What we lack is caterpillars, tractors and men principally." (Tr. 4074-5-6-7-8-9)

He further testified that for Fibreboard to proceed to black out fifty feet around the perimeter of the fire independently would have led to complications:

"Q. And even though they had gone and just blacked everything out, you think that would have interfered?

A. If we were in there, too.

Q. I am assuming now that they were doing the same you were doing, trying to black out the 50 feet.

A. I think that could have led to some complications.

Q. You think it could?

A. Yes.

Q. What kind of complication? Would you explain that?

A. Yes, first, that it would have—we were dependent, too, upon their crew and their equipment, as I brought out yesterday. Now, if they were in there, and then would come the problem of who was doing what in the area to eliminate possibilities of overlap, but more serious, probably, was the division of responsibility in case something went wrong. There would have been most certainly a passing of the buck in that case.

Q. Assuming, now, that after you released the crew to go back to logging, Fibreboard elected to keep their crew on there and did actually black out the entire 50 feet around the perimeter, how would that interfere in any way with your mop up?

A. I think that it would have complicated it. Yes, I think it would have complicated it.

Q. Now, if after September 13 Fibreboard had maintained a ten-man day patrol on the 1600-acre area to look for and put out smokes, would that have interfered with your mop up and patrol?

A. Yes, I think it would have interfered and have complicated and particularly as to responsibilities." (Tr. 4206-7-8)

The record abounds with testimony that Fibreboard's action in connection with Forest Service and its so-called independent action was proper, and customary practice (Tr. 2868-4262-4394).

Mop-Up Action by Forest Service After August 7

The preponderance of the evidence points up the fact that the action taken by the Forest Service after August 7, the date upon which the fire spread to Fibreboard's land, was in all respects proper. It followed a well-established practice and procedure (Tr. 910). For example, it completely blacked out a 50-foot strip on the perimeter of the 1600-acre area (Tr. 1101).

Robert Young, employee of appellant Rayonier, was a sector boss during the mop-up action until August 11. He said that when he left on that date: "The fire was in good shape" (Tr. 1668). You could drive through the 1600-acre area some days in September prior to the 19th and see no smokes at all (Evans, Tr. 1329). No smokes were seen in the 1600-acre area for five days immediately prior to September 19 except at L-1, L-2 and one other place (Tr. 1618). There was no flare-up in L-1 on September 13 (Tr. 1330). L-1 was cleared better than average (Tr. 641).

As pointed out by the trial court in its memorandum decision, it is impossible to find and put out every last fire smoldering in buried roots and logs. This is particularly true in areas of this proportion and in rugged terrain in which the 1600-acre area was contained (R. 198). Again, the evidence was substantial and we submit preponderated in favor of the finding that there was no negligence on the part of the Forest Service in failing to maintain a night patrol on the 1600-acre area or in the number of men and amount of equipment used in the mop-up. Mr. J. LeRoy MacDonald categorically

stated that it was not imprudent under the circumstances existing at the time to refrain from having a patrol on the night of September 19; that the State of Washington which he represented would not have maintained a patrol on the area if this burned-over tract had been in its jurisdiction (Tr. 1775). There is also substantial testimony that such a patrol would have been ineffective in any event (Tr. 1599, 2490, 2823). At the time of this incident it was good practice and was actually the practice of fire fighting organizations to get out of the woods at night with their crew under the circumstances existing at the 1600-acre tract on the night of September 19 (MacDonald, Tr. 1770). Fibreboard would have interfered with Forest Service action by putting a patrol on the burned-over area on or after September 13 (Tr. 4208). Fibreboard did not know and had no reason to know that the lookout at the North Point lookout station had left the station and traveled to Snider Ranger Station on the night of September 19 (Tr. 4480). Certainly it cannot be seriously contended that Fibreboard should have stepped in and overruled the Forest Service or supplemented its mop-up activities by independent action on its part. In addition to State Warden MacDonald, other expert witnesses testified to the same effect. If Fibreboard were to be held negligent under such circumstances, it would mean that it was being expected to know more than the experts and the professional fire fighters. The Forest Service to whom the Fibreboard Company looked for service, protection and advice in fighting fires was in full control of the situation. Fibreboard, acting as a

prudent landowner upon whose lands the fire had spread, had a right to rely upon the judgment of these professional fire fighters.

Proximate Cause of September 20 Fire Was Wind and Weather Conditions

In Amended Finding XVIII, the court specifically found that:

> "The sole, proximate cause of the damages to plaintiffs . . . was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951." (R. 235, 236)

There is no dispute that the season of 1951 was unusually dry. On the morning of September 20 anything in the woods would burn (Tr. 907). Fire could start and burn in any timber area under conditions existing on September 20 (Tr. 1605). Fire could have started in slash, burned-over slash or green timber on the morning of September 20. Fire was just as apt to ignite in burned-over slash as in unburned slash, "maybe a little more so" (Tr. 4090; Colvill, Tr. 4098). Mr. Pearson, Fibreboard logging superintendent, testified that on the morning of September 20 it was the hardest wind he had ever "seen" at that time or in that area where he had spent many years; that gravel was being blown so as to hit his tin hat (Tr. 2104). It was the worst fire day ever witnessed by witness Carl H. Russell, District Supervisor of Olympic Peninsula for the State of Washington in 1951, since "a fire day" that he recalled when he was on the Skagit in western Washington in 1913 (Tr. 4401). It was common knowldege that many

fires went out of control in western Washington on September 20 (Tr. 1438).

Obviously, the court's finding that the fortuitous combination of wind and weather caused the fire and the resulting damages is amply supported by the evidence.

Defendant Fibreboard Followed the Usual and Customary Practice in Suppressing the Fire Which Came Upon Its Lands Where Forest Service Had Control and Responsibility of the Fire

There was little, if any, dispute in the testimony that the conduct of Fibreboard during the time elapsing after August 7, the day the fire spread upon its land, and September 20, the date of the Forks fire, was in accordance with established practice and custom under the circumstances then and there existing. The usual practice under such conditions is to rely upon the wardens or fire rangers who take control and to cooperate with them. While usual practice is not conclusive of due care, it is good evidence to support a finding of due care.

In *Stephens v. Mutual Lumber Co.,* 103 Wash. 1, 173 Pac. 1031, the court said:

> "The appellant had used such precautions in the operation of his camp as are usually employed by those engaged in the logging business."

In *Silver Falls Timber Co. v. Eastern & Western Lumber Co.,* 40 P.(2d) 703 (Ore.), the court quoting from a Utah case said:

> "While it is true that the word usage, usual, custom or ordinary is used, yet it is quite apparent that the only object of the inquiry was to inform the jury as to the ordinary manner in which such work is performed and from such testimony determine whether or not defendants were or were not guilty of negligence."

The court further quoting from an earlier Oregon case said:

> "When there is no absolute standard of care fixed by law, evidence of what is usual is often of value in assisting a court or jury in determining the issues on a charge of negligence."

Appellants Arnholds' Authorities on Alleged Duty or Right of Landowner to Supplement Forest Service Fire Fighting Organization

On page 54 of appellants' brief, *Galbraith v. Wheeler-Osgood Co.,* 123 Wash. 229, 212 Pac. 174, is cited as authority for the proposition that a landowner has a right to "take precautions in addition to those prescribed by the forester" if he thinks the forester's precautions inadequate. In the instant case Fibreboard did not think that the forester's precautions were inadequate and had no reason to question its fire fighting activities (Tr. 4515). *Wood & Iverson, Inc. v. Northwest Lumber Co.,* 141 Wash. 534, 208 and 252 Pac. 98 (*en banc*), is also cited in support of this proposition.

In the *Galbraith* case the fire warden was employed by the defendant and acted in his "individual and not in his official capacity." This arrangement was clearly understood by the parties before the warden was em-

ployed. The forester wrote the defendant prior to the burning and said: "You understand that fire wardens do not go on duty for the State before June 1st so he is at liberty to attend any matter of this kind for private parties." The case distinguished the instance where the abatement was done by the Forestry Department and stated in that instance: "It may be . . . he could not be chargeable for the losses caused by the act of the state forester."

The *Wood & Iverson* case predicated liability on the landowner because of his failure to cut snags in accordance with the statutory mandate which required the removal of "all dry snags, stubs and dead trees over 25 feet in height before undertaking any slash burning." The court said that the duty prescribed by the statute to cut snags was not discretionary on the part of the department or the landowner. This case, like the *Galbraith* case, involved slash fires that went out of control after they were started.

In *State v. Gourly,* 209 Ore. 363, 305 P.(2d) 396, the State sued to collect an assessment for the cost incurred in fighting a fire. The fire started on lands belonging to defendant Empire. The fire did not spread onto defendant's land from the land of another but started in the logging area which had been assigned to Gourly Bros. by Empire for logging operations. The court simply held that it was a question for the jury whether or not every reasonable effort to control the fire had been taken and that "the statutory or contractual duties of others than the defendants and the extent of their efforts made in performance of such duties so far as known to de-

fendants or so far as they should have been known to them would be matters for the consideration of the jury in deciding whether under all the circumstances the defendants severally made every reasonable effort to control the fire."

In the instant case, we have a fact finding based upon substantial evidence that every reasonable effort was made to control the fire and that Fibreboard could not have been expected to recognize any so-called inadequacy of the Forest Service on August 6 and 7, or at any time.

The three foregoing cases relied upon by appellants Arnhold lend no credence to the contention that Fibreboard had any duty to supplement the Forest Service action beyond the cooperation which it actually extended to that organization.

Washington Fire Fighting Slash Statutes

The trial court did not in its findings or amended findings specifically refer to the charge made against Fibreboard concerning the slash on Section 31 adjacent to the 16,00-acre burned area. It disposed of all of the charges against Fibreboard in its amended finding, XV (R. 234), in which it said: "Plaintiffs did not show by a preponderance of the evidence that defendant Fibreboard failed to use ordinary care in any of the particulars of negligence alleged by plaintiffs."

In its memorandum decision it said:

> "Under the circumstances, indisputably shown by the evidence, a finding of negligence on the part

> of Fibreboard in not disposing of the slash on its lands in the vicinity of the 1,600 acre tract or in the alternative, procuring state clearance certificate on such slashed lands, is not justified and has not been made." (R. 189)

The court went on to state that plaintiffs Arnhold contend that under the Washington statutes the owner of land containing logging slash, absent certificate of clearance thereof by the State Supervisor of Forestry, is absolutely liable for damage to other land owners "caused by fire emanating from, even though not originating on, such slashed land" (R. 189, 190).

The court then concluded that although the Washington Supreme Court has not passed on the latter question, that the Washington State Legislature in enacting the slashed statutes did not intend to impose absolute liability (R. 191).

Appellants in their brief at page 56 now state that the rule of liability to be applied is not one of liability without fault, but that the statutes impose standards of care, the violation of which is negligence *per se*. Nevertheless these appellants apparently take the position that the mere presence of unburned slash under the circumstances referred to by the trial court in its memorandum decision impose liability. On page 56 of appellant Arnholds' brief it is stated that "it may be true, as contended by Fibreboard, that it is 'common practice among timber owners and operators not to burn logging debris unless it presents an unusually hazardous situation and unless required to do so by the State Fire Warden or State Forest Ranger (R. 400)'." It is obvious

that it not only may be true but was established by a preponderance of the evidence that it was not only common practice to refrain from burning logging debris on the Olympic Peninsula, but that it would be negligence in most instances to burn slash. Under circumstances similar to those with which Fibreboard was confronted by the slash in the North Half of the South Half of Section 31, it would be risky to burn (Tr. 4095-2524). To hold that the mere presence of slash on the Fibreboard lands referred to gave rise to a cause of action in negligence for civil liability would defeat the very purpose of the Legislative Fire Fighting Statutes, which is to preserve the forests. It would force land owners to burn. If they did not burn it would force the "Supervisor" to "summarily cause it to be abated" and charge the cost of abating and burning to the land owner. RCW 76.04-.370. The foregoing statute refers to slash as a fire hazard. It provides that the Supervisor may give the land owner notice under certain circumstances and assess the cost of burning the slash to the land owner if he refuses to abate the slash after receiving the notice. Fibreboard had never been served with notice or requested to abate the slash on Section 31 (Tr. 500). It refrained from burning this slash, first, for the reason that Fibreboard followed the general policy of not burning unless requested to do so; second, for the reason that it was more dangerous to burn this particular slash than to allow it to deteriorate; and third, the slash was located in an area away from highways and the general public where the risk of fire is greatest (Tr. 2088).

Some of the reasons for the danger that would have

been involved in burning the slash included the fact that adjacent to the three 40's in Section 31 referred to in the record was state and government land containing unfelled snags (Tr. 4433-894).

Slash Statutes Set Up No Standard of Care and Create No Civil Liability

The Fire Fighting Statute RCW 76.04.370 above referred to was amended in 1929 (Laws of 1929, Chapter 134, Section 1, Page 351). The deleting of the word "nuisance" in this statute when it was amended in 1929 is important. The present statute refers to slash only as a fire hazard and not as a nuisance. No civil liability is provided. This statute, as well as the other provisions found in RCW Title 76, Chapter 76.04 under the heading "Forest Protection," are merely penal in nature. The Legislature obviously refrained from setting up standards of care so far as the land owner is concerned but placed that in the Supervisor. The Washington Supreme Court has said:

> "The sanction imposed, in the event of failure to remove (slash) is liability for fire fighting cost made necessary by reason of such hazard."
>
> *State v. Canyon Lumber Corp.,* 46 Wn.(2d) 701, 284 P.(2d) 316.

In the *Canyon Lumber* case the state brought an action to recover for fire fighting costs "incurred by the Division of Forestry in suppressing a 6,000 acre forest fire which occurred in Whatcom County, Washington, in September, 1951." The court held that the complaint was good as against the demurrer which had been sus-

tained by the lower court on the theory that the statutes were unconstitutional. It further held that the state's allegation that the slash conditions necessitated the fire fighting expense was good as against demurrer.

History of Forestry Laws of the State of Washington

In this case the supervision of fighting the fire was taken over by the forestry personnel, both Federal and State. Since the claim of liability on the part of Fibreboard is predicated upon the State's statutes, we submit that these statutes relieve Fibreboard of any responsibility for supervision. As already indicated, the statutory provisions prior to 1929 specified what the landowner was to do on his own responsibility and judgment. The one exception was the snag statute which specified that snags over 25 feet should be removed. Otherwise, the provisions were mostly of reasonable judgment on the part of the landowner.

The modern statute puts the supervision in the supervisor and wardens appointed by the Director of Conservation and Development RCW 76.04.010. The wardens police the forest RCW 76.04.070. The Director of the Department designates the hazardous fire area RCW 76.04.150. The Supervisor issues permits for fires in the closed season and directs how, when and where the fire shall be made RCW 76.04.150, 160, 170. The safety requirements for machinery is put under the supervision of this Department RCW 76.04.250, 260. The Supervisor may abate hazard at landowner's expense RCW 76.04.370.

Great stress is put on the fire patrol assessments and

the provisions of the statute declare the standard of care to be that of the Forestry Department. For instance, in RCW 76.04.170, compliance with the terms of a burning permit "shall constitute and be deemed the exercise of care of a prudent and careful man with respect to the starting and control of such fire." Here is a definite statement that the judgment of the wardens or rangers granting the permit shall be the standard of care required.

Specifying the duties of wardens, RCW 76.04.070, the wardens are required to investigate all fires, set the back fires to control fires and "summon, impress and employ help in controlling fire." By impressing the employees of Fibreboard into their fire fighting ranks, the Department assumes the responsibility for the abatement of the fire, a duty particularly proscribed for "uncontrolled fire" in RCW 76.04.380. The whole philosophy of the present forestry laws and slash statutes is entirely contrary to the old philosophy placing the responsibility of judgment on the shoulders of the landowner. The philosophy of the present law is that the public officials take care of the forest and supervise any fire fighting necessary. Under the present statutes the standard of due care is prescribed to be the judgment of the Supervisor. The statute with reference to the forest of the Olympic Peninsula, RCW 76.04.450, does not establish any specific standard of care but recognizes that there is a "fire hazard caused by reason of the unusual quantity of fallen timber upon such land," and the following statute, RCW 76.04.460, provides that: "The director through the Division of Forestry shall promulgate rules

and regulations for the protection of the forest and timber situated upon the land described in RCW 76.04-.450 from damage or destruction by fire." The following statute RCW 76.04.470 even provides that "such rules and regulations or amendments thereto shall be promulgated by publication. . . ."

If Fibreboard had attempted to burn the slash in question, it is obvious from the preponderance of the evidence that it would have exposed the forest to the hazard of fire. If Fibreboard had decided to take the chance of burning the slash in Section 31 during the closed season, it would have been required under RCW 76.04.170 to obtain a permit from the Supervisor, Warden or Ranger so to do. We submit that it is doubtful that such a permit would have been issued in view of the location of the slash and the fact, as reflected by the testimony, that the State and Forest Service were both hesitant to burn slash under these conditions. Doubtless this fact explains the undisputed testimony in the case that practically all landowners or persons in possession had unburned slash on their land prior to the September 20 fire. This is true as to the State, the Government, and appellant Rayonier as well as others. It also accounts for the fact, established by the evidence, that most if not all landowners and operators in the area in question followed the policy of not burning slash on the Olympic Peninsula (Tr. 4473). The record abounds with testimony that prudent landowners and operators did not burn slash on the Olympic Peninsula. Fibreboard's Logging Superintendent, Mr. Petrus Pearson, when asked "Why didn't you burn the slash in these

three 40's on Section 31," submitted the following reasons:

"A. Well, there is more than one reason.

Q. All right. Let's have them all at one time.

A. The first reason is that with present utilization of timber the slash burning becomes less and less important. More of the trees are used, and there is lots less residue on the ground.

Another reason for not burning slash is that that was all a closed area. We had a gate across our road. It wasn't open to the public excepting we opened it during the hunting season if the weather permitted.

Q. By that, let me interrupt you, what do you mean?

A. We had a cable across the bridge there. In fact, the first people up there after the fire started had to cut the cable.

Q. Does it make a difference if you have got a slash area, say, along the highway where people might be throwing cigarettes or something?

A. Oh, yes.

Q. Is that what you mean?

A. Yes. Another reason, we felt that that area was well protected by a broad band of cleared area that had been some of the burn in '38, some slash burn, and also, the last band was what we slash burned in 1945, which isolated the actual slash up there.

Another reason for not burning it, burning slash, there is a question in my mind whether slash burning helps too much in forest fires at any rate. This fire traveled just as fast very nearly, in the area that had been slash burned and cleared as in areas

that had slash on it. There seemed to be very little difference. But at any rate, burning slash in an area up against those snags, you would almost have to fall those bigger snags like that or else you would probably be fighting the fire the next year also.

Q. Now, these snags that you mentioned were on government land and on State of Washington land, is that right?

A. That's right." (Tr. 2088-2089)

The United States and the State of Washington both used their discretion and decided if, when, and where to burn slash (Tr. 398-413). Warning and notice would be given private operators at the discretion of the foresters if slash on private lands appeared too dangerous (Tr. 414). The weighing of the danger of slash burning obviously went into the consideration by the authorities as to whether to request a private operator to burn. "Slash burning is a hazardous occupation" (Floe, Tr. 895). Unburned slash was left on some government lands rather than to take chances of burning (Tr. 501). Judgment must be exercised in all cases as to whether to burn or not to burn slash (Tr. 787-802-896). There are circumstances in which there would be as much or more hazard in burning as in not burning (Floe, Tr. 787). It is always dangerous to burn near snag areas (Cowan, Tr. 2524). It would have been risky to burn slash in Section 31 (Colvill, Tr. 4095).

There is less slash burning than in prior years. In response to a question by the trial court, Mr. Floe testified:

"THE COURT: Well, is the net result of the whole

business that there is actually less slash burning done?

THE WITNESS: That is true."

Robert Cunningham, logging superintendent for appellant Rayonier, had never burned slash either as an individual or as a Rayonier man. "We didn't believe in burning slash" (Tr. 1916). In relating the fact that Rayonier does not burn slash, he said:

"Q. You have been with Rayonier, you say, since 1945?

A. That is true.

Q. Do you, as a Rayonier man or individually, burn slash at all in the Olympic Peninsula?

A. No, we do not.

Q. You do not?

A. No.

MR. MCKELVY: That is all.

THE COURT: I believe you said that you do not believe that that is a proper procedure. Is that right?

THE WITNESS: Yes" (Tr. 1956-1957).

C. J. Hopkins, logging manager for the Peninsula Plywood Company operating on the Olympic Peninsula, testified that his company does not burn slash in the Olympic Peninsula area (Tr. 473). Some of his company's lands were burned over by the fire of September 2 0(Tr. 4360).

All parties, including the Government and the State, had slash on their lands between the 1600-acre area and Forks. Government officials at times have differences

about slash burning (Tr. 4219-4221). The State had approximately 1,000 acres of unburned slash between the 1,600 acre area and Forks over which the September 20 fire burned (McDonald Tr. 1781). The State didn't always burn its slash (Tr. 1783).

Slash in the North half of the South half of Section 31 consisted mainly of small logs, but did not contain limbs, small pieces of material or dried needles (Edward Drake, Forest Service employee, Tr. 1526). Fibreboard had felled approximately one and one-half to two million feet of snags in Section 31 prior to 1951 (Tr. 2087). There was Rayonier unburned slash between the 1,600 acre area and Forks (Tr. 2897). Appellant's expert, Harold Jones, described himself as a "non-slash burner" (Tr. 2910). Rayonier burned no slash (Floe, Tr. 3463). Fibreboard had previously experienced uncontrolled slash fires after being requested by the authorities to burn slash (Tr. 2092-3-4). The United States had had several uncontrolled slash fires on its land in the area covered by the cooperative agreement during the few years before 1951 (Tr. 904). Floe told Fibreboard to burn slash in 1945. That fire went out of control (Tr. 2092). Fibreboard had trouble with slash fire requested by State in October, 1952 (Tr. 2101). Clearance certificates are never granted authorities unless requested by land owner or operator (Tr. 4430). The clean-up by Fibreboard during logging operations in Sections 31, 32 and 33 was good (Floe, Tr. 899).

Appellant Arnholds' Authorities Pertaining to Existence of Slash

The case of *Great Northern Railway v. Oakley,* cited at page 55, appellant Arnholds' brief, 135 Wash. 279, 237 Pac. 990, was decided before the change in the statute referred to in which the word "nuisance" was deleted and, therefore, has no application in the instant case. The cases of *Theurer v. Condon*, 34 Wn.(2d) 448, 209 P.(2d) 311, and *Pig'n Whistle Corp. v. Scenic Photo Co.,* 55 F.(2d) 854, cited on page 56 of appellant Arnholds' brief, involved direct violation of the respective ordinances therein referred to. In the *Theurer* case there was an installation made in violation of a fire ordinance in that an oil tank was located less than the required minimum of 3 feet from the range, which violation resulted in a fire. In the *Pig'n Whistle* case, the defendant had used a ventilation shaft as a grease film duct in direct violation of a city ordinance.

In *Spokane International Ry. Co. v. United States,* 72 F.(2d) 440, there was evidence that the defendant violated an Idaho statute which provided that it should keep its right of way "clear and free from all combustible and inflammable material, matter or substances." The court held that the statutory requirement was reasonable, not impossible of fulfillment, and merely required the removal of cheat grass from its right of way.

The court said:

> "Although the statute should not be construed to impose on defendant a standard of care impossible

> of fulfillment, there is nothing to show that this cheat grass could not have been removed."

Obviously, this is not in point in the instant case where the record abounds with testimony that it is poor policy to burn slash; that there is more danger involved in burning slash than to allow it to deteriorate and where the record indisputably shows that whether or not a chance of burning slash should be taken must depend upon discretion and judgment and the surrounding circumstances and where a preponderance of the testimony shows that it is a better policy to refrain from burning slash. Fibreboard could not have safely burned the slash in Section 31.

The case of *Browning v. Slenderella Systems of Seattle,* 154 Wash. Dec. 586, 341 P.(2d) 882, cited on page 56 of appellants' brief, as holding that a civil action may arise from a statute criminal in form has reference to a situation where the violation of the statute is necessarily "a wrong against the individual" involved. In that case the defendant refused to render services to the plaintiff because of race and color. This should not be likened to the slash statute in question allowing only the State to recover for fire fighting costs.

Remington's 76.04.370 does not set up a standard or measure of care and at most the duty is that of a reasonable man under the circumstances. Surely in an action brought by the State to recover fire fighting costs the defendant would be permitted to show that the setting of a slash fire would have created a greater fire hazard than to allow the slash to remain. The trial court's find-

ing that there was no negligence in this regard is abundantly supported by the record.

In any event the evidence clearly shows and the trial court found that the sole proximate cause of the incident complained of was the unforeseeable and fortuitous combination of wind and weather conditions. Even if we should assume *arguendo* that, as contended by the appellants Arnhold, there was a violation of the forest protection statutes which was negligence *per se,* such alleged negligence was not the proximate cause of the September 20 fire.

CONCLUSION

The Forest Service, pursuant to the "cooperative agreement" with the State of Washington authorized by RCW 76.04.400, assumed control of the fires complained of and proceeded to take "immediate vigorous action." The testimony of the Forest Service personnel bordered on praise of Fibreboard's action and cooperation in connection with these fires (Tr. 4074-4079). Fibreboard could not be expected to know more or even as much as the expert fire fighting organization of the United States. The Forest Service was the most highly skilled forest fire organization in the country (Tr. 1624).

Fibreboard followed the usual and customary practice in connection with its conduct and activities in the period in question. We think that a fair inference could be drawn from the evidence that so far as the Government is concerned, it felt that Fibreboard went beyond the call of duty so far as its activities and cooperation

were concerned. It acted prudently and refrained from burning slash that would have created a hazard to the forest. It was never served with a notice to abate the slash in Section 31, probably for reasons heretofore discussed. Fibreboard was completely satisfied with the conduct of the Forest Service. It could not be expected to have questioned the Forest Service activities during the period of the fires. Fibreboard's manager, Mr. Hartnagel, said that Fibreboard had no criticism of the Forest Service activities (Tr. 4425). As pointed out by the trial court, it is difficult to view the services rendered by the Government without indulging in hindsight reasoning as distinguished from decisions that were necessarily made on the ground.

If experts such as were employed by the Forest Service and other experts who testified at the trial could not anticipate the fortuitous event of September 20, certainly it is unreasonable to say that Fibreboard was negligent in not doing so.

> "Precaution is a duty only so far as there is reason for apprehension."
>
> *Smith v. Boston & M. R. R.,* 87 N. H. 246, 177 Atl. 729.

To be free from negligence a man is not legally bound to safeguard against occurrences that cannot reasonably be expected or contemplated.

> *Hanson v. Washington Water Power Co.,* 165 Wash. 497, 5 P.(2d) 1025.

It is not negligence of a man of science to make a mis-

take if he has brought to bear a reasonable degree of skill and care.

Howatt v. Cartwright, 128 Wash. 343, 22 Pac. 496;

Jordan v. Skinner, 187 Wash. 617, 60 P.(2d) 697;

Smith v. Beard, 56 Wyo. 375, 110 P.(2d) 260.

The rule is well expressed in an old admiralty case, *The Tom Lysle,* 48 Fed. 690 (D.C.W.D. Penn.).

> "The distinction between an error of judgment and negligence is not easily determined. It would seem, however, that if one, assuming a responsibility as an expert, possesses a knowledge of the facts and circumstances in connection with the duty he is about to perform and, bringing to bear all his professed experience and skill, weighs those facts and circumstances, and decides upon a course of action which he faithfully attempts to carry out then want of success, if due to such course of action, would be due to error of judgment, and not to negligence. But if he omits to inform himself as to the facts and circumstances, or does not possess the knowledge, experience, or skill which he professes then a failure, if caused thereby, would be negligence. 'No one can be charged with carelessness, when he does that which his judgment approves, or where he omits to do that of which he has no time to judge. Such act or omission, if faulty, may be called his mistake, but not carelessness.' *Brown v. French,* 104 Pa. St. 604; *Williams v. LeBar,* 141 Pa. St. 149, 21 Atl. Rep. 525."

The doctrine so aptly expressed in the foregoing quotation may be pertinent to the Government's case.

In any event, it has greater significance when applied to Fibreboard's situation for the reason that to hold Fibreboard negligent in failing to detect any alleged inadequacies of the Forest Service fire fighting activities would be to say that Fibreboard was called upon to outguess the experts.

The September 20 Forks fire "happened fortuitously" (R. 203) and on the same day that other large fires occurred in western Washington. Significantly, one of appellants' expert witnesses, Mr. Cowan, Manager of the Washington Forest Fire Association, in referring to the Forks fire of September 20, 1951, in the annual report of the Washington Forest Fire Association for 1951 (Exhibit 171) said among other things, "We attach no blame . . ." (Tr. 2462).

The trial court had the opportunity to judge of the credibility of the witnesses and the weight to be given to the evidence. The trial judge availed himself of the very valuable opportunity of viewing the rugged terrain where the fires occurred. This view was made before listening to the testimony. The trial court's findings absolving Fibreboard of all negligence are obviously not "clearly erroneous" but are abundantly supported by the preponderance of the evidence. It is respectfully submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

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No. 16367

United States Court of Appeals
For the Ninth Circuit

ARTHUR A. ARNHOLD, *et al., Appellants,*

vs.

UNITED STATES OF AMERICA, *et al., Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF FOR APPELLEES: Port Angeles and Western Railroad Company, and A. R. Truax, Trustee in Reorganization

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JURISDICTION

The District Court had jurisdiction over the subject matter of and the parties to this action under 28 U.S.C. secs. 1331, 1346(b) and 2671-80, commonly known as the Federal Tort Claims Act (R. 3, 171, 172; Concl. II, R. 236; Find. II, R. 243), with respect to the appellee United States of America, and under 28 U.S.C. sec. 1332 by reason of diversity of citizenship with respect to the other appellees, Fibreboard Products, Inc. and the Port Angeles and Western Railroad Company (hereinafter referred to as the "PAW") and A. R. Truax, Trustee in Reorganization (R. 172; Find. II, R. 228, 229; Concl. II, R. 236).

This court has jurisdiction of the appeal under 28 U.S.C. secs. 1291 and 1294(1).

STATEMENT OF THE CASE

1. History of the Litigation

On March 1, 1954, the district court dismissed the complaint with prejudice with respect only to the appellee United States of America, which dismissal was affirmed by this Court on September 1, 1955. *Arnhold, et al. v. United States,* 225 F.(2d) 650 (1955). The Supreme Court of the United States vacated the judgment of this Court on January 28, 1957 and remanded the case to the district court for trial. *Rayonier Incorporated v. United States,* 352 U.S. 315 (1957).

Some time after the conclusion of trial against all appellees, the district court filed a memorandum opinion on June 23, 1958 (R. 171-205). Thereafter, on July 1, 1958, the district court filed its original findings of fact and conclusions of law (R. 205-215). Pursuant thereto, judgment was entered on July 10, 1958 dismissing the actions of the plaintiffs with prejudice and also dismissing with prejudice the cross-complaint of the United States of America against the PAW.

On July 18, 1958, the appellants filed motions to amend the findings of fact, conclusions of law and judgment (R. 473-479). Thereafter on September 15, 1958, the district court filed amended findings of fact and conclusions of law (R. 227-237). On September 16, 1958, the district court entered an order amending its previously filed memorandum opinion (R. 238-241). Notice of Appeal was filed by the appellants Arnhold, *et al.* on September 19, 1959. The United States of America has not appealed from the dismissal with prejudice of its cross-complaint against the PAW.

2. Questions Presented

Did negligent acts of the PAW with respect to the general condition of its railroad right-of-way proximately cause or contribute to the start or subsequent spread of the Heckleville fire?

Did negligent acts of the PAW, or of the United States of America acting in any way for the PAW, in failing to take proper action to suppress and extinguish the Heckleville fire at its inception, or at any time on August 6 or 7, 1951, proximately cause or contribute to the spread of the fire to the 1600-acre area or proximately cause any damage to the appellants?

Did appellants establish by a preponderance of the evidence that the PAW failed to use ordinary care in any particular other than with respect to the condition of its right of way, namely, in failing to furnish a speeder patrol, in operating a train on August 6, 1951 under conditions then prevailing, and in failing to recognize and remedy the inadequacies of the Forest Service in the fighting of the fire?

3. Summary of the Facts

Appellee PAW generally accepts the summary of the facts as given on pages 2 through 19 of appellants' brief as it applies to the PAW with the exception of certain statements to which PAW objects and to which the following corrections are made:

(a) It is not true, as stated on page 3 of appellants' brief that the PAW refused to take any responsibility for fighting the fire. The testimony of the PAW's gen-

eral manager, Le Gear (Tr. 87) makes it clear that the PAW only declined to acknowledge financial responsibility for the Heckleville fire and when asked whether the PAW wanted to take over the fire, Le Gear indicated that the fire was then on United States property (presumably beyond the right-of-way), that the Forest Service had the men and equipment needed to fight the fire, and that any responsibility of the PAW for the expense could be talked over afterwards. The record shows that the PAW not only lent its active support to the Forest Service personnel in charge of the fire, but that the PAW engaged its men and equipment in the actual fighting of the fire (Tr. 87, 88, 128, 131, 132, 241, 876, 877, 878).

(b) Similarly, it is not accurate to state (pages 4, 5 Arnhold brief) that the PAW did nothing to abate the fire-hazardous conditions along its right-of-way. The record shows clearly that the PAW took all action possible within its limited financial resources to abate and correct fire-hazardous conditions along its right-of-way (Tr. 33, 34, 36, 37, 113, 114).

(c) Appellants' summary of the actions of the train crew (page 6, Arnhold brief) does not clearly bring out that the crew which sighted the smoke of a fire west of Flight just before coming into Fibreboard Camp One did not know whether the fire was on the right-of-way or not but reported it to Snider Ranger Station and were advised that the Forest Service already knew about this fire. It was this fire (apparently the one in section 35) to which the train crew was planning to return and help fight when their engine broke down.

While standing by the telephone and waiting for the repair of the engine, the train crew was not immediately aware of the existence of the Heckleville fire. In fact, they did not discover it until some time after it was reported to District Ranger Floe at 1:00 p.m. by the fire lookout at North Point (Tr. 306, 307, 315, 343, 344, 345).

Other aspects of the evidence which are not mentioned or not placed in proper perspective will be dealt with in connection with subsequent analysis of the findings to which appellants object.

There are several assertions made by the Arnhold appellants which are not fully supported by the record to which we wish to call attention before taking up our general argument:

(a) At page 28 of their brief, appellants suggest that the negligence of the United States with respect to combating the existing Heckleville fire "consisted of creating an unreasonable risk of a fire occurring and escaping to the damage of the plaintiffs." Appellants urge that the trial judge repeatedly so characterized the risks, and in support thereof cite the judge's comment that ". . . a poorly kept right of way would, of course, be more likely to contribute to starting the fire or its spread afterwards" (R. 268) (Arnhold brief, p. 29). The full meaning of this quotation is somewhat different when read in context with the succeeding sentence of the judge's comment:

> ". . . and I recognized in thinking about it exactly in the manner that you have said, that a poorly-

> kept right of way would, of course, be more likely to contribute to starting the fire or its spread afterwards. But I felt that there was not even a scintilla of evidence in this case justifying me in finding as a fact that this fire was causally related to —this fire at Heckelville was causally related to the conditions complained of. (R. 268)"

(b) At page 32 of their brief, appellants declare that "it is clear from the findings that the negligence of defendants continued up to August 10, 1951, at least." There is no indication in the Amended Findings (R. 227-236) that the negligence of the PAW or the United States under Finding XIII related to any date later than August 6th, the first day of the Heckleville fire, or at the latest, August 7th, and it is obvious in the record that it could not. The court clearly found in Finding XVII (R. 235) that "Plaintiffs did not show by a preponderance of the evidence that the defendant United States failed to use reasonable care in mop-up or other firefighting activities after August 7, . . ."

(c) At page 36 of their brief, appellants quote the court's Finding XVIII in part that "The sole proximate cause of the damages to plaintiffs in the amounts stipulated herein was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951" (R. 235-236). In their footnote at the bottom of page 36 of their brief, appellants claim that this finding "falls far short of a finding that the weather conditions were extraordinary or unusual," seemingly ignoring Finding XII of the court (R. 233) holding ". . . . In the early morning of September 20, at some time between midnight and 4:00

a.m., an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred . . ."

SUMMARY OF ARGUMENT

I.

The district judge found that the appellants did not establish by a preponderance of the evidence that negligence on the part of the PAW caused or contributed to the start or subsequent spread of the Heckleville fire (Amended Find. XIII, R. 234). The trial judge went further and found that the sole proximate cause of the damages to appellants was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951 (Amended Find. XVIII, R. 235-236), on which date all of the damages were sustained by appellants. Both of these findings are fully supported by evidence in the lengthy record and should not be disturbed because of the particular evidence cited by the appellants.

II.

No negligence of the PAW was a cause in fact of the damages sustained by the appellants on September 20, 1951, and, consequently, under general principles of law recognized by the State of Washington, the PAW is not liable.

ARGUMENT

The trial court found that none of the damages sustained by the appellants was proximately caused by any negligence of the PAW or of the United States of

America. This decision followed a lengthy trial covering approximately two months, reception of approximately two hundred exhibits, testimony of thirty-three witnesses, and an inspection of the fire area by the trial judge.

Appellants have attacked the following findings:

(1) That it was not shown by a preponderance of the evidence that PAW failed to use ordinary care in any particular other than that stated in Finding XIII (Find. XIV, R. 234).

(2) That it was not established by a preponderance of the evidence that the failure of the PAW and the United States to use ordinary care in maintaining the railroad right of way in a reasonably fire-safe condition proximately caused or contributed to the start or subsequent spread of the Heckleville fire (Find. XIII, R. 234).

(3) That while the United States Forest Service, having taken control of the fighting of the Heckleville fire at its outset, did not exercise reasonable care in its initial attack on the fire, it was not established by a preponderance of the evidence that had such negligence not existed, the fire would have been contained in the 60-acre area, or that there was any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area (Find. XVI, R. 235-236).

(4) That the United States was not shown by a preponderance of the evidence to have failed to use reasonable care in mop-up or other firefighting actviities or in any other particular after August 7 (Find. XVII, R. 235).

(5) That in the early morning of September 20, at some time between midnight and 4:00 a.m., an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred, causing a flare-up of fire inside the 1600-acre area which thereafter caused appellants' damages (Find. XII, R. 233-234).

(6) That the sole proximate cause of damage to the appellants was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951 (Find. XVIII, R. 235-236).

It is our contention that appellants' attack on the above cited findings should be rejected by this Court since the findings are either compelled by the evidence taken in its entirety, or, in any event, because there is certainly substantial evidence to sustain the reasonableness of the trial judge's findings. The fact that another trier of fact might reasonably have concluded otherwise is not grounds for reversal upon appeal. *United States v. United States Gypsum Co.*, 333 U.S. 364, 365 (1948).

We further contend that the findings compelled the conclusion of the trial judge that neither the PAW nor the United States was liable for the property damage sustained by appellants.

I.

All of the Findings of the Trial Court Challenged by the Appellants Are Well Supported by Evidence in the Record

A. Appellants failed to establish by a preponderance of the evidence that PAW failed to use ordinary care in any particular other than that stated in Finding XIII (Find. XIV, R. 234).

Plaintiff Arnhold *et al.* had alleged seven particular acts of negligence on behalf of the PAW. Three of these particulars related to the maintenance of the PAW right-of-way. The remaining allegations of negligence were in failing to furnish the follow-up patrol under weather conditions then existing contrary to statute; in failing to station fire fighting equipment in sufficient quantity and at proper locations along the right-of-way; in operating its train under the weather conditions then existing without the use of a follow-up patrol and the presence of adequate fire fighting equipment; and, in failing to extinguish the Heckleville fire or to take any steps to extinguish the fires.

Of the aforementioned allegations, the court found the PAW negligent only in regard to its right-of-way maintenance (R. 234), the evidence failing to show the defendant railroad negligent in any other particular (R. 234). These areas in which the court found no negligence will be discussed first.

a. Failure to furnish follow-up patrol in violation of statute.

There was in effect in August of 1951, and there remains in effect today, the following Washington Statute:

"RCW 76.04.260, Locomotives, Steamboilers-Speeder patrols. It shall be unlawful for anyone to operate within one-eighth mile of any forest land during the period April 15 to October 15 inclusive, which period shall be designated as the closed season unless the designated season is extended by the supervisor due to dangerous fire condition: * * *

"(2) Any common carrier railroad trains operating through forest lands unless:

"(a) Such trains are followed by a speeder patrol at such times and in such places as the supervisor may designate, * * *."

The key portion of this statute in relation to defendant railroad is the phrase found in sub-paragraph (2)(a), "at such times and in such places as the supervisor may designate." There is no evidence in the record indicating that the supervisor or anyone else at any time during the summer of 1951, and in particular on or about August 6, 1951, requested or directed that the PAW furnish a speeder or other patrol for its train. Conversely, the record is abundantly clear that no such request nor designation was made (Tr. 54, 57, 120, 121, 163, 164, 166, 167, 170, 171, 266, 286, 292, 470, 1202, 1778, 1779, 4408, 4409, 4538, 4539). As the trial judge said in his memorandum decision, "Plaintiffs in the *Arnhold* case in contending for negligence by PAW as a matter of law for violation of the statute referred to recognize the necessity of the notice specified in the quoted portion of the statute and assert such notice was provided by the general season closure notice, exhibit 27, and by oral notice given in the spring of 1951 at or

shortly before commencement of the fire closure season. Exhibit 27 contains no reference whatever to speeder patrols and there is no preponderance of evidence establishing that in fact oral notice requiring speeder patrols was given. For want of proof of the notice required by the statute violation thereof by PAW is not shown and plaintiff's contention of negligence *per se* in that particular cannot be sustained" (R. 186).

b. *Failure to station fire fighting equipment in sufficient quantity and at proper locations along the right-of-way.*

There is again a lack of evidence supporting the allegation of negligence against defendant railroad. Furthermore, there is no evidence in the record that the fire spread was in any manner occasioned or contributed to by a lack of such equipment. On the other hand, there is ample evidence that the railroad had supplied all equipment required by statute, and that the engines were equipped with proper tools and fire fighting equipment (Tr. 1306).

On a railroad right-of-way which is approximately 55 miles long, including spurs and sidings (Tr. 114), it would appear self evident that well-equipped locomotives, carrying with them a considerable supply of hand tools, in addition to a large supply of water, a pump and hose, provide far greater fire protection than is obtained by the stationing of tools at various points along a right-of-way. The record is clear that all PAW locomotives were equipped in such a manner (Tr. 121, 122, 1306, 3473, 3474).

c. *Operation of train under weather conditions existing on August 6, 1951, without the use of follow-up patrol and presence of adequate fire fighting equipment.*

Appellants Arnhold *et al.,* having failed to sustain their allegation of negligence on behalf of the PAW for having violated RCW 76.04.260, alleged that even in the absence of a violation of the statute, the PAW was negligent in failing to provide a follow-up patrol in the exercise of reasonable care. Again, referring to the trial court's memorandum decision (R. 186), "Plaintiffs contend, arguendo, that if the speeder control statute was not violated, such patrol was required in the exercise of reasonable care under the existing circumstances. Despite the daily and frequent passage of logging trains in the Heckleville area west of Camp One there is no evidence of any train-caused right of way fire having occurred in that area at any previous time. In the steep grade portions of the right of way east of Camp One, where brakeshoe fires frequently occurred, speeder patrols were regularly provided. If the necessity of speeder patrols in the Heckleville area appeared clearly enough to make their absence a want of due care, the State Supervisor of Forestry and his subordinate, the State Fire Warden, both primarily responsible for enforcement of state law concerning speeder patrols, certainly should and undoubtedly would have given definite and unequivocal notice and demand for speeder patrol in the Heckleville area followed by reasonably frequent and careful checkup on compliance. From the fact that these actions were not taken and because of other circumstances shown in evidence, including the intended but fortuitously pre-

vented immediate return of the engine over the Heckleville area right of way which would have provided as good or better fire patrol than a speeder, findings negativing lack of due care with respect of speeder patrol have been entered."

The court's observations in this regard and its findings entered pursuant thereto are well founded by the evidence contained in the record. First of all, it should be borne in mind that the PAW was a common carrier railroad, and hence, was not free to shut down its operations if and when it chose to do so (Tr. 123, 124). Secondly, the PAW's duty in regard to operation of speeder or follow-up patrol was specifically covered by statute, and was fully complied with as we have seen in sub-paragraph (a) hereof. Thirdly, if the PAW had a duty to supply a follow-up patrol beyond the duty imposed by statute the record is clear that it fulfilled such duty. Again, the PAW right-of-way, including spurs and sidings, was only 55 miles in length (Tr. 114). Its locomotives provided their own follow-up patrol by their activities in retracing their own steps (Tr. 53, 54, 237, 238, 239, 866, 867, 3607, 3608). Had the untimely and unforeseeable breakdown of the 6th of August, 1951, not occurred, engine No. 1347 would have been at the scene of the outbreak of the Heckleville fire within a matter of minutes from the time of its origin.

Fourthly, as pointed out before, engine No. 1347 was well equipped with tools and equipment for fire suppression (Tr. 121, 122, 1306, 3473, 3474), and except for an unforeseeable chain of events, would have been

at the scene of the Heckleville fire within minutes of the fire's origin.

In addition, if we were to assume the PAW negligent in any of these regards, the problem of proximate cause would remain.

d. *Failure to extinguish the Heckleville fire or to take any steps to extinguish the fire.*

It is obvious that the PAW did not extinguish the Heckleville fire. The question is, however, was this due to its negligence? The answer to this question answers the second half of this allegation, that the PAW took no steps to accomplish this.

This allegation assumes as a fact that the fire could have been extinguished on the 6th day of August, 1951, within a reasonable period of time after its being discovered. This, the court has refused to find (R. 234, 281, 292, 293, 294). The court has found that the PAW engine was unable to return to the scene of the Heckleville fire because of mechanical failure, and that the PAW neither ignored nor refused any request for men or equipment to combat the fire (Amended Findings of Fact X, R. 232, 233). The record clearly supports this finding.

The train crew of PAW engine No. 1347 promptly reported the Section 35 fire upon its discovery (Tr. 71, 306, 307, 344, 345). It took prompt and reasonable action to return to the site of the Section 35 fire to actively combat it, being prevented from so doing only by a fortuitous chain of events involving the mechani-

cal failure of the engine (Tr. 307, 308, 311, 312, 315, 346). Upon the necessary repairs being made to the engine, it proceeded to the immediate scene of the Heckleville fire and lent such assistance as was requested (Tr. 191, 192, 193, 194, 195, 315, 316, 317, 318, 349, 350). Thereafter, PAW crews continued to assist in their best capacity, and rendered all assistance requested by the United States Forest Service officer in charge of the fire (Tr. 195, 196, 197, 269, 270, 271, 272, 330, 331, 876, 877, 878, 1305). Therefore, this allegation of negligence falls for failure of proof.

We acknowledge that, under Washington law, an owner or occupant of forest land, such as the PAW with respect to its right-of-way, with knowledge of a fire burning on such land, must exercise ordinary and reasonable care to prevent spread of the fire to the damage of others. Failure to do so is negligence rendering the landowner or occupant liable for all damage proximately resulting therefrom. *Sandberg v. Cavanaugh Timber Co.,* 95 Wash. 556, 164 Pac. 200 (*En Banc* 1917); *Jordan v. Spokane, Portland & Seattle Ry. Co.,* 109 Wash. 476, 186 Pac. 875 (1920); *Galbraith v. Wheeler-Osgood Co.,* 123 Wash. 229, 212 Pac. 174 (1923).

Once the existence of the Heckleville fire was known to the PAW employees, the record is clear, as cited above, that the PAW cooperated promptly and fully with the Forest Service which assumed control and direction of the fighting of the fire. As the trial judge properly observed:

"The final charge of negligence against PAW is that in the exercise of reasonable care PAW ought to have recognized the lack of due care in the fighting of the fire by the Forest Service and that PAW ought to have supplied the deficiency in firefighting. As indicated in the applicable principle of law earlier stated herein, with knowledge of a fire on its right of way, whether caused by its engine or not, PAW had the duty to exercise reasonable care to confine and suppress the fire. However, if it appeared to PAW in the exercise of reasonable care that experienced, competent firefighters were in charge of the fire and apparently taking every reasonable measure to confine and suppress the fire, the mere fact, long later determined, that the firefighting was inadequately or imprudently performed would not justify finding PAW negligent. During the course of the firefighting, both on the right of way and thereafter, a number of highly competent and experienced forest fire fighters were on the scene as participants or observers. There is no evidence that at any time during the long battle any of these experts or any representatives of any plaintiff or anyone else interested in protecting life and property then in jeopardy either condemned, criticized or offered suggestions concerning means or method used in fighting the fire. Under all the circumstances there is a failure of proof of negligence on the part of PAW in the discussed particular." (R. 187-188)

There is no dispute that all but a small portion of the 60-acre area was outside the PAW right-of-way and owned by the United States of America and the appellee Fibreboard Products, Inc., who also owned all of the 1600-acre area. The PAW did not have the equip-

ment, the trained personnel, the requisite authority or the resources with which to undertake fighting any fires outside of its own right-of-way or to pass judgment upon the decisions of the experts employed by the Forest Service.

B. Appellants failed to establish by a preponderance of the evidence that the failure of the PAW and the United States to use ordinary care in maintaining the railroad right-of-way in a reasonably fire-safe condition proximately caused or contributed to the start or subsequent spread of the Heckleville fire (Find. XIII, R. 234).

The only negligence found by the trial court on the part of the PAW was a failure to use ordinary care in maintaining the railroad right-of-way in a reasonably fire-safe condition. Even here the evidence is somewhat inconclusive. As the court said:

> "I recall that among other things this fire was said to have originated at a cut. I recall there was direct evidence and a lot of inference that the conditions in that particular area were much better than they were elsewhere on the right of way. I have commented about that, and I [28] thought I have given due allowance for this factor that you now speak of in saying that I thought the evidence was sufficient in view of the Abrahm's case and others, finding the defendant negligent with respect of the condition at the point of the fire. To tell you the honest truth, in my judgment that borders very closely to speculation, which I continually admonish the juries not to do and which I, at least, ought to be cautious not to do by myself.
>
> "Actually, I don't know anything about the con-

dition of the right of way where this fire started; neither do you or anybody else. Not any of us knows what the condition of the right of way was at the place where the fire first started. We don't even know where the fire first started let alone know what the condition there was, not any of us." (R. 268, 269).

But, for the appellants to prove negligence is not enough to allow them to recover. They must go on to prove that their losses were occasioned, or proximately caused by the negligence thus established. This, as the record shows, and the trial court found, they have failed to do (Amended Find. IX, R. 234). As the court commented during the arguments on the Amended Findings of Fact, "Well, of course, this whole area of the case is a matter that I pondered at great length and in great detail on the subject. It is not something that I hastily or lightly arrived at, however poor the judgment may have been, and I recognized in thinking about it exactly in the manner that you have said, that a poorly-kept right of way would, of course, be more likely to contribute to starting the fire or its spread afterwards. But I felt that there was not even a scintilla of evidence in this case justifying me in finding as a fact that this fire was causally related to—this fire at Heckleville was causally related to the conditions complained of." (R. 268).

The court's finding in this regard and its comments just referred to are well taken. The record indeed contains no evidence (1) that the fire started in any excess of combustible material negligently allowed to accumu-

late on the right-of-way, or (2) that the presence of any such material either contributed to or caused the spread of the fire on the right-of-way to surrounding lands (R. 269).

As the record clearly shows, the weather conditions in the Olympic Peninsula area during the spring and summer of 1951, and particularly the period just preceeding August 6, 1951, were some of the driest and most hazardous ever of record (R. 231, Amended Find. VIII). In fact, the brief of appellants Arnhold, *et al.*, at page three thereof, contains the following language: "The spring and summer of 1951 were among the driest on record in the Sol Duc district. Burning conditions were severe in August of 1951 resulting from below-normal rainfall and less than usual relative humidity.

"The area had been officially described as a region of extra fire hazard for over a month prior to the outbreak of the fire (Finding VII, R. 209)." This being so, the evidence is clear that all railroad right-of-ways are inflammable during periods when weather conditions were as they thus appeared on August 6, 1951 (Tr. 129, 290, 291, 881, 1307, 1308, 1309, 1310, 1315, 1316, 1603, 1604, 1665).

In short, the evidence amounts to and the court simply found that the PAW right-of-way was generally not well kept, but there is no evidence that these conditions, or the PAW's negligence in this respect had any effect on the fire's origin or spread, and to say that the fire wouldn't have started and spread, just as it did, had

this negligence not existed is the purest form of speculation.

It is urged by the appellants Arnhold (Arnhold Brief, pages 22-24) that an eyewitness account of the moment of ignition is not required. We do not deny that in a proper case, the trier of fact *may* infer from circumstantial evidence that a fire started at a particular place and in a particular manner. Thus in the only Washington case cited by appellants on this point, *Abrams v. Seattle & Montana Ry. Co.,* 27 Wash. 507, 68 Pac. 78 (1902), the significant point is that there was sufficient circumstantial evidence to allow the trier of fact to draw the inference that the fire was started by the defendant's railroad locomotive and the further inference that the fire ignited in debris on the right-of-way. The distance between the passing locomotive and the barn was approximately fifty feet, all of which distance was covered by debris, and there was no indication of a strong wind which might have carried the sparks from the locomotive farther away. The court indicated that the question was whether the jury was warranted in its findings and that the questions of the weight and sufficiency of evidence "is usually, if not always, a question for the jury." *Abrams v. Seattle & Montana Ry. Co.,* 27 Wash. 507, at 513, 68 Pac. 78 (1902).

There was no direct evidence as to the precise point where the Heckleville fire started and that any negligent accumulation of combustible material caused or contributed to the start of that fire. No witness had

actual knowledge of the condition of the right of way at the point where the fire started (R. 268, 269).

Actually there was considerable testimony that, in Section 30, conditions were much better than elsewhere on the railroad. For example, the brush was not as heavy or as close to the tracks and the right-of-way was cleared to five or six feet from each side of the roadbed (Tr. 189, 265, 295-296). There had not been any right-of-way fires in that area (R. 186).

The witness Evans who was the first to arrive at the Heckleville fire and was in charge of fighting it during the early hours of the fire on August 6th could not recall specifically that there were rotted or discarded ties on the right-of-way within the fire area (Tr. 1012-1014, 1146-1149, 1315-1316).

There was no evidence that there was an excess of combustible material which should have been removed at the point of origin of the Heckleville fire. Absent this, the trier of fact was justified in not inferring that such an excess of combustible material caused or contributed to the start of the fire. In any event, the trier of fact was not *compelled* to draw such an inference where there was ample evidence, as cited above, that all railroad right-of-ways are inflammable during conditions such as existed on August 6, 1951, and consequently that it was equally or more inferable that an excess of combustible material did *not* cause or contribute to the start of the fire.

Grass grows very rapidly in the area of the Heckleville fire. Even when grass is cut in the spring, the cus-

tomary time for doing so on a properly maintained right-of-way, the grass would grow again rapidly and there would be dry grass and similar materials found on the right-of-way during the summer and fall. Under a normal tie-replacement program on an eight year cycle, approximately one-eighth of the ties would be in various stages of decay (Exhibits 178, A, B, and C; Tr. 3738, 3752-3757, 3806-3808).

Under these circumstances, it was understandable and proper for the trier of fact to conclude that he could not determine with reasonable probability and without inference on inference whether any excess of combustible material on the right-of-way was actually at the initial point of the fire (R. 184-185). The trial judge properly concluded:

> " . . . It simply cannot be determined from the evidence with any degree of certainty or with reasonable probability and without inference on inference where, how or why the fire ignited, nor whether any excess of combustible material on the right of way was actually at the initial point of the fire. For all that appears in the evidence, considering the extremely dry ground conditions and low atmospheric humidity at the time, the hot droppings from the engine might well have started a fire in a sound tie of excellent condition or in little wisps of dried grass or similar material to be found on the right of ways of similar railroads in the area at the time of year in question no matter how well kept up with respect of fire precautions. In these circumstances, causal relationship between the negligence of PAW with respect of the condition of its right of way and the initial igniting and sub-

sequent spread of the Heckleville fire is not established by a preponderance of the evidence." (R. 184-185)

The appellants similarly attack (*Arnhold* Brief, pages 25-27) the trial court's finding that it had not been established by a preponderance of the evidence that the undue accumulation of combustible material on the right-of-way caused or contributed to the spread of the fire. Appellants have not cited any evidence which would *compel* the trier of fact to infer that the fire would not have spread as rapidly had there been only the customary amount of inflammable material in the right-of-way, and not any negligent accumulation.

Under the unusually dry conditions and low humidity prevailing on August 7, as previously pointed out, anything and everything could and did burn, and the trial judge was certainly reasonable in inferring, as he did, that the causative factor of the spread of the fire might well have been these conditions, rather than any negligent accumulation of inflammable material on the right-of-way.

C. Appellants failed to establish by a preponderance of the evidence that there was any causal relationship between the Forest Service negligence in its initial attack upon the 60-acre fire and the ultimate existence of fire in the 1600-acre area (Find. XVI, R. 234-235)

It is important to direct attention to the language of Finding XVI in its amended form, particularly to the last sentence thereof which was added by the judge following the argument of appellants' motion to amend the findings when the judge observed:

"I am concerned with whether I have used the right language to express what I found and believed. I am satisfied that the Forest Service in what I call 'the initial fire period,' August 6, 7, did not act as promptly and fully and effectively as reasonable care required. . . . In my judgment, whether that negligence was the cause of the fire escaping and ultimately being in the 60-acre area and the 1600-acre area, is a matter of speculation.

"In my judgment, under the evidence and considering the conditions existing at the time, it is impossible for me or anyone else to say that the fire could have been contained or suppressed even with the ultimate action by the Forest Service during that period. I will readily agree that one person might think that the fire could have been contained and even put out. But I think there is a reasonable inference from the evidence for another reasonable mind to conclude that it couldn't have been under the conditions existing at that time considering the extremely difficult and hazardous conditions with respect of fire in existence at that time.

"Now, in my opinion, the Forest Service people were negligent in that respect, but there is no showing that there is any causal relationship between that and the ultimate existence of fire in the 1600-acre area. [55]

"If anything I have said in the findings seems to conflict with this, it is a matter of mistaken wording or language. . . . " (R. 292-293)

Accordingly Amended Finding XVI now reads in its entirety:

"XVI.

"District Ranger Floe and his subordinates,

acting within the scope of their duties as officers and employees of the United States, failed to act as promptly, vigorously and continuously as they were required to do in the exercise of ordinary care in attacking the Heckleville spot fire and in attempting to confine it to the 60-acre area. Whether, or at what time and place, the fire might have been contained or suppressed within said area but for such negligence is a matter of speculation and cannot be determined as a reasonable probability under the evidence. It has not been established by a preponderance of the evidence that had such negligence not existed, the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area." (R. 234-235)

There is ample evidence in the Record to sustain the reasonableness of the trial court in making Finding XVI.

There was extensive testimony which was not consistent with regard to how many men and how much equipment would have been sufficient to contain the fire at various times after it was first reported at 1:00 p.m. on August 6th, but the court did not find that District Ranger Floe knew or should have known that any particular number of men or particular amount of equipment would be sufficient. The witnesses themselves and the court recognized that such judgments with respect to how many men or how much equipment would be sufficient might be the product of hindsight (Tr. 1045, R. 195-196).

Since the opinion of the experts differed with respect

to how much equipment and how many men would have been required to suppress the fire at various times on August 6 and 7, the court was justified in determining what weight to give to such testimony (Tr. 2393, 2436, 2445, 2592-2594, 2651).

D. Appellants did not establish by a preponderance of the evidence that the United States failed to use reasonable care in mop-up or other fire-fighting activities, or in any other respect after August 7 (Finding XVII, R. 235).

There was ample evidence to support this finding that there was no negligence on the part of the United States after August 7. Actually appellants' own witnesses agreed that the Forest Service did an excellent job on August 8th through 10th until the fire was controlled on the 1600-acre area (Tr. 2905, 3068).

After August 10th, mop-up continued (Tr. 1490-1502; 3679), inspections were made, and fires which flared up were extinguished (Tr. 1108-1109, 1217-1220, 1222-1223). The evidence with respect to the effectiveness and desirability of a night patrol on the night of September 19 was conflicting (Tr. 2526-2527, 2667, 2957-2958, 1597, 1773-1775, 1795, 2096, 3599-3600).

Contrary to the contention of appellants, the preponderance of the evidence was that the fire of September 20 did not come from L-1 (Tr. 1535-1537, 2082-2083, 4089, 4299-4300).

Appellants urge that because the fire on September 20th came from the 1600-acre area, this was conclusive evidence that the Forest Service was negligent in

mopping up the fire. The evidence showed, however, that mop-up is difficult in such terrain, and that a fire may smolder throughout the heavy rains of the winter (Tr. 1100-1101, 3993-3996, 883, 2406).

The court understandably recognized that it was common and accepted practice, as followed by the Forest Service in this instance, to keep the area under surveillance by daytime patrol, to suppress smokes and flareups as they occurred, and to wait for the heavy rains of late September and October to quench the fire (R. 198-199).

E. The court was justified in finding that an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred on September 20, causing a flare-up of fire inside the 1600-acre area (Find. XII, R. 233) and that these conditions were unforeseeable and fortuitous (Find. XVIII, R. 236).

While there was lengthy testimony and numerous exhibits with reference to the weather conditions immediately preceding September 20 and on September 20, this evidence did not establish that the combination of weather conditions actually experienced on September 19-20 were to be expected or were reasonably foreseeable. The last weather forecast received on the evening of September 19th by the Forest Service indicated:

> "Olympic - Mt. Baker Districts: Thursday: Patches of fog during early morning, otherwise high scattered to broken clouds. Little change in temperature. Humidity about 10% lower, with minimium near 30%. Winds northeasterly 12 to 16 exposed areas." (Exh. 44; Tr. 1596)

Under then accepted terminology (Exh. 104; Tr. 3325), the weather predicted was to be expected in the middle of the afternoon of September 20, at which time the highest wind velocity of 16 miles per hour and the lowest humidity of about 30% could be anticipated (Tr. 1596-1597, 3322-3323, 3379). The forecast of fog indicated the prospect of a cool night without appreciable wind (Tr. 1594, 1596-1597, 1938, 3322-3323, 3379-3380).

There were a number of witnesses to the weather conditions of September 19-20 to whose testimony the court was entitled to give great weight, and their testimony clearly supports Findings XII and XVIII.

Petrus Pearson, a resident of Western Washington for 49 years, testified that the wind that morning was 30 to 35 miles per hour (Tr. 2078, 4498), and graphically described the situation:

> "I had a tin hat on. . . . I had to hold on to that to keep it on. The wind was picking up sharp bits of gravel and throwing it in your face with a stinging sensation, and there was things rolling around on the road, and the dust was flying. . . I never [in September] saw a northeast wind blow that hard or a east wind." (Tr. 2104)

State District Warden McDonald who was at the fire scene at about 4:00 a.m. on September 20, estimated the wind at 32 to 38 miles per hour (Tr. 1743). Winds of 39 miles per hour and over are classified as gale-force winds on the Beaufort's Wind Scale (Exh. 164).

The state lookout at Gunderson who reported the fire

at 3:15 a.m. on the 20th, estimated the wind at about 40 miles per hour and said that his lookout tower was "rattling and weaving" (Tr. 3291).

Another witness, James Anderson, who had several years' experience taking wind recordings on an anemometer, testified that the wind was 35 to 45 miles per hour and much stronger at times at 5:30 a.m. and 7:00 a.m. on the 20th in the Calawah area and at Hyas Ridge (Exh. 108). These points were 9 to 10 miles southwest of the 1600-acre area. He was concerned that the wind would blow trees across the road and block him from escaping the fire. He considered the wind the strongest wind he had ever seen on the Olympic Peninsula during a fire season (Tr. 3209-3213, 3215, 3218-3220, 3230-3231).

II.

Under the Findings of the District Court, the Negligence of the PAW Was Not a Cause in Fact of Appellants' Damage

As plaintiffs, appellants had the burden of proof to establish by a fair preponderance of the evidence both negligence as charged and proximate causal relationship of such negligence to claimed damage. In doing so, substantial evidence and not a mere scintilla is required, as pointed out by the trial court (R. 181). *Carley v. Allen,* 31 Wn.(2d) 730, 198 P.(2d) 827 (1948); *Wilson v. Northern Pacific Railway Co.,* 44 Wn.(2d) 122, 265 P.(2d) 815 (1954); *Evans v. Yakima Valley Transportation Co.,* 39 Wn.(2d) 841, 239 P.(2d) 336 (1952).

Abstract negligence which is not shown to be the

proximate cause of damage will not sustain a finding of liability. Prosser on Torts (2d ed., 1955), pp. 218-220.

Proximate cause is defined as that cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the damage, and without which the damage would not have occurred. *Squires v. McLaughlin,* 44 Wn.(2d) 43, 47, 265 P.(2d) 265 (1953); *Burr v. Clark,* 30 Wn.(2d) 149, 157, 190 P.(2d) 769 (1948).

The Washington Supreme Court holds that before any question of proximate cause can arise, it must be shown that the negligence found was the cause in fact.

> "There is, of course, a distinction between an actual cause, or cause in fact, and a proximate, or legal, cause.
>
> "An actual cause, or cause in fact, exists when the act of the defendant is a necessary antecedent of the consequences for which recovery is sought, that is, when the injury would not have resulted 'but for' the act in question. But a cause in fact, although it is a *sine qua non* of legal liability, does not of itself support an action for negligence. Considerations of justice and public policy require that a certain degree of proximity exist between the act done or omitted and the harm sustained, before legal liability may be predicated upon the 'cause' in question. It is only when this necessary degree of proximity is present that the cause in fact becomes a legal, or proximate, cause."

Eckerson v. Ford's Prairie School Dist. No. 11, 3 Wn.(2d) 475, 482, 101 P.(2d) 345 (1940);

Guerin v. Thompson, 53 Wn.(2d) 515, 519, 335 P.(2d) 36 (1959).

Applying the above principles, the trial judge did not find it necessary to decide whether the weather conditions on the morning of September 20 were an intervening, superseding cause or a concurring cause, and consequently appellants' discussion of these concepts is pointless. As of September 20, no negligence of the PAW or the United States, or of anyone else, was in existence for the weather conditions of September 20 to supersede, or to make possible any intervening or concurring cause.

Under the findings of the court previously discussed, the only negligence of the PAW (or of the United States) relating to the condition of its right-of-way did not contribute to the start or spread of the Heckleville fire. Similarly, the only negligence of the United States relating to the initial attack on the fire in its 60-acre area on August 6 and 7 did not contribute to the presence of fire in the 1600-acre area. Consequently, as of September 20, the presence of any fire in the 1600-acre area was not the result of any negligence of either the PAW or the Forest Service, and there was no continuing risk created by either.

The cases cited by appellant on this issue all involve negligence which was an actual cause of the damage and the question was whether the actual cause was a proximate cause. In the instant case the trial judge did not find as a fact that the negligence of the PAW or the Forest Service was responsible for the presence of fire

in the 1600-acre area and, therefore, an actual cause of appellants' damage.

For example, *Johnson v. Kosmos Portland Cement Co.,* 64 F.(2d) 193 (6th Cir. 1933), involved the negligence of a defendant who failed to clean an oil barge thus creating a continuing risk of explosion which was ignited by lightning. In *Theurer v. Condon,* 34 Wn. (2d) 448, 209 P.(2d) 311 (1949), a fire hazard created by the negligent installation of an oil burner in 1937 continued until 1944 when other negligence concurred with it to cause a fire. In *Seibly v. Sunnyside,* 178 Wash. 632, 35 P.(2d) 56 (1934), the negligence of the city in burning weeds along a highway during a high wind was a cause in fact of the damages to a truck and the only question was the concurrent negligence of the driver in driving through, which did not relieve the city, the two tort feasors being jointly and severally liable. Similarly, in *Tope v. King County,* 189 Wash. 463, 65 P.(2d) 1283 (1937), the county's negligence in casting water upon the lands of others was a cause in fact of the damages resulting from an act of God (a flood) which would not have damaged the plaintiffs but for the county's negligence. In *Teter v. Olympia Lodge No. 1, I.O.O.F.,* 195 Wash. 185, 80 P.(2d) 547 (1938), the negligence, consisting of allowing the wall of a burned out building to remain standing, was the actual cause of the damage to plaintiffs, and created a continuing risk with which wind concurred to cause damage.

Appellants' arguments regarding foreseeability and remoteness are irrelevant until there has been a prior

determination that any negligence found is a cause in fact of the damage — only then does the court have to determine the question of proximate cause.

Upon the basis of the trial court's findings, the only negligence of the PAW and the Forest Service was not a cause in fact of appellants' damage, and consequently there was no negligence to be "superseded." The court went on, however, to find:

> " . . . In the early morning of September 20, at some time between midnight and 4:00 a.m., an extraordinary concurrence of high temperature, low humidity and gale-force wind occurred, causing a flare-up of fire inside the 1600-acre area, which quickly spread out of control onto Fibreboard land to the south and west. From there it moved rapidly and at times by great jumps for a distance of 20 miles in a southwesterly direction to and within the town of Forks causing damage to the property of plaintiffs." (Find. XII, R. 233-234)
>
> " . . . The sole proximate cause of the damages to plaintiffs in the amounts stipulated here was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951." (Find. XVIII, R. 235-236)

Since the trial court was unable to find any negligence on the part of the PAW or the Forest Service with respect to the breakout of the fire on September 20, it did not find it necessary to discuss or decide "whether the strong wind, the high temperature, the low humidity, or the concurrence of the three during the night in question, was an Act of God as that term is meant in law" (R. 201).

III. Under Washington law the PAW is not liable for damages resulting from the fire that originated upon and escaped from its right-of-way.

None of the cases cited by appellants in their brief (Arnhold Brief, pages 45-48) involve all of the factual elements present in the instant case, and, accordingly, it is meaningless for appellants to contend (Arnhold Brief, p. 45) that "The negligence found against the PAW has always been deemed sufficient grounds for recovery against railroads."

Any question of negligence in the release of fire igniting material by the PAW has been removed from this case. As the court observed in its Memorandum Opinion, "It is not alleged by plaintiffs nor is there evidence showing that the release from the engine of fire igniting material was due to negligence" (R. 175).

All of the cases cited by appellants on pages 45-46 of their brief were jury cases. *Jordan v. Welch,* 61 Wash. 569, 112 Pac. 656 (1911); *Abrams v. Seattle & Montana Rwy. Co.,* 27 Wash. 507, 68 Pac. 78 (1902); *Jordan v. Spokane, Portland & Seattle Ry. Co.,* 109 Wash. 476, 186 Pac. 875 (1920); *McCann v. Chicago, Milwaukee & Puget Sound R. Co.,* 91 Wash. 626, 158 Pac. 243 (1916); *Slaton v. Chicago, Milwaukee & St. Paul Railway Co.,* 97 Wash. 441, 166 Pac. 644 (1917).

Thus *Jordan v. Welch* involved a jury verdict affirmed on appeal, and the appellate court observed, at page 572, "This negligence in no way involved any defect in the engine, or any negligent manner of operation, except as the jury *might* (emphasis added) have

held that discharging live coals upon the right of way under the circumstances was 'negligent operation'." There is no suggestion that the jury was *compelled* to so hold as a matter of law, and the *Welch* case has only been cited once by the Washington Supreme Court in a fire case where it was cited for the proposition that an owner or occupier of land is required to use reasonable care to prevent fire from spreading from his own land. *Criscola v. Guglielmelli,* 50 Wn.(2d) 29, 31, 308 P.(2d) 239 (1957). In the instant case the trier of fact chose to find otherwise than a jury *might* have found.

The *Abrams* case also involved a jury verdict affirmed upon appeal, and the inflammable debris was deposited not only upon the railroad right-of-way, but also between the right-of-way and plaintiff's barn, and there was evidence of previous fires in the very same debris after the passage of other trains. The court observed that "the jury were *privileged* (emphasis added) to make up their verdict from that part of the evidence most favorable to the contention of the respondent," (*Abrams* case, p. 510) and that "It is not a question of no evidence, but one of the weight and sufficiency of evidence; and this is usually, if not always, a question for the jury" (*Abrams* case, p. 513).

In *Jordan v. Spokane, Portland & Seattle Railway Company,* the court reversed a nonsuit granted at the close of plaintiff's case upon the grounds that there was evidence from which a jury *might* find that the railroad was negligent in failing to take reasonable means to prevent the escape and spread of a fire after the railroad knew of the fire's existence.

In the *McCann* case, there was again a jury verdict for the plaintiff and the question upon appeal was whether there was sufficient evidence to entitle the plaintiff to go to the jury, but there is no suggestion that the jury was compelled to find for the plaintiff.

In the *Slaton* case, a jury verdict for the plaintiff was sustained, and the court was concerned with the admissability of evidence (evidence of other fires from which inferences might be drawn as to knowledge toleration of a right-of-way condition) and whether a jury *might* infer that an oil burning engine could cause a fire, the question of preponderance of the evidence on this point being for the jury to decide.

It may be that historically the Washington court has been willing to allow considerable latitude in the amount of evidence required to take a railroad fire case to the jury, and in *allowing* the jury to draw inferences even from limited circumstantial evidence. But this does not mean that the trier of fact, whether jury or judge, is relieved of its duty and right to draw the inferences and make the findings based upon the evidence, and, particularly, to determine whether the plaintiff has sustained the burden of establishing a fact by a preponderance of the evidence.

In effect, appellants are basically appealing from numerous findings of fact made by the court after a lengthy trial in which there was extensive evidence, and the suggestion that other triers of fact *might* have found otherwise is not grounds for reversal, and appellants' contention that the court was *compelled* to find in their favor is without merit.

For the foregoing reasons, we respectfully submit that the judgment below should be affirmed.

Dated this 23rd day of February, 1960.

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REPLY BRIEF OF APPELLANTS

I. INTRODUCTION

The primary issue raised by this appeal is the liability of the Government and PAW upon the findings of fact made by the trial court. Simply stated it is the proposition that negligence before, at and after the inception of a fire is the legal cause of damage done by that fire when it has been determined from the evidence that the negligent actors knew of the risks they created and negligently permitted the risk to be realized in actual harm to these appellants.

In substance, the briefs of all of the respondents avoid reply or attention to the basic proposition of the law of negligence, beg the question posed by the findings or rely solely upon the trial court's bare legal conclusion of lack of separate and distinct proof of proximate cause despite its manifest inconsistency with all other findings of fact and lack of support in the evidence.

The first 21 pages of the Government's brief is

largely an unnecessary and argumentative statement of the Government's evidence at the trial which it there unsuccessfully maintained was a showing of due care. From pages 29 to 43 the Government again argues factual questions which the judge set at rest in his findings that the PAW and Government were:

> "negligent in allowing a fire hazardous condition to exist on its right of way generally and in the particular area where the Heckleville fire started." (R. 184) and
>
> "failed to use ordinary care in maintaining the railroad right of way generally and specifically in the area of the Heckleville fire, in a reasonably fire safe condition (R. 234)," and
>
> "a finding of negligence chargeable to the United States in the initial period [of the fire] is required" (R. 197), and
>
> "Ranger Floe and his subordinates . . . failed to act as promptly, vigorously and continuously as they were required to do in the exercise of ordinary care in attacking the Heckleville spot fire and attempting to confine it to the 60-acres area." (R. 234-5), and such failures,
>
> "make the difference between a small fire quickly disposed of with little or no damage and a conflagration of extensive proportions resulting in great loss of life and property." (R. 197).

In short, all of the factual factors upon which a conclusion of legal cause is predicated were found in favor of appellants. Respondents have only argued that the Court erred in finding such factors, or have urged that the trial court should have found that there was in fact no negligence relating to the occurrence or spread of the fire or should have found

that there was some cause other than the Heckleville fire for appellants' damage. The trial court did not and could not do so.

II. Washington Law

No respondent has answered the basic problem of this appeal: that Washington Law—and the rule of law announced by but not followed by the trial court—requires that judgment should be for the appellants upon the Findings of Fact made below. The District Court in his memorandum opinion clearly and concisely stated the universal rule of proximate cause, that:

> "All damages of a kind reasonably foreseeable as a consequence of the failure to exercise reasonable care for the restraint and suppression of a fire may be recovered against the negligent party. To constitute an intervening independent cause as a break in the chain of proximate causation precluding recovery against a negligent defendant, Acts of God or negligence of others must be the sole proximate cause of the damage complained of. The burden of going forward with evidence sufficient to sustain a finding of intervening, independent, proximate cause rests on the party asserting it. If negligence of a defendant in starting or in failing to confine or suppress a fire combines and concurs with the negligence of others or with Acts of God to proximately cause damage to third parties, such defendant is liable for the whole of the damage so caused. [citing cases]"

Having noticed the applicable rule of proximate cause, the court thereafter ignored it.

If it is assumed that the fire started in "material to be found on the right of way of similar railroads in the area at the time of year in question no matter

how well kept up with respect of fire precautions" (R. 185) the fire surely did not miraculously confine itself to such material as it spread out of control. Surely if fate had destined the occurrence and spread of the fire, such an Act-of-God fire was concurrent with Ranger Floe's previous negligence and lackadaisical efforts to control it and the burden was upon PAW and the Government "of going forward with evidence sufficient to sustain a finding" that the Act of God "must be the sole proximate cause," i.e. that negligence had no bearing upon the occurrence or spread of the fire. At the trial no witness said that a fire is as likely to occur on a well kept right of way as on a poorly kept one. No one said fire will or on August 6, 1951, would have spread as fast or as far on a well-kept right of way as it did on the littered right of way. No witness said the Heckleville spot fire was not controllable and could not have been controlled by due diligence. All agreed that the contrary was the case at least during the early stages of the fire.

No respondent has disputed the rule of law announced by the court or distinguished the numerous cases relied upon by the court for so ruling nor offered any factual evidence from the record justifying deviation from that principle.

> "The fundamental basis of the law of negligence is the ability of the actor reasonably to foresee the consequences of his misconduct. If the particular injury was reasonably expectable at the time of the misconduct, then the act of negligence will be regarded as the legal, or proximate cause of the injuries sustained." *Eckerson v. Ford's Prairie School District No.* 11, 3 Wn. (2d) 475, 484, 101 P. (2d) 345, 350, (1940).

Such a determination of proximate cause is purely a legal question, similar to that where violation of a statutory standard of care creates the exact hazard the statute was intended to prevent. In such a situation, "reasonable minds could not differ upon the conclusions that the violation of the statutory standard of care . . . was a proximate and legal cause of the accident." *Guerin v. Thompson,* 53 Wn. (2d) 515, 520, 335 P. (2d) 36, 39, (1959).

> "Where, as here, the facts are taken as undisputed, and the references therefrom are plain and do not admit of reasonable doubt or difference of opinion, questions of proximate cause become a question of law for the court." *Cook v. Seidenverg,* 36 Wn.(2d) 255, 262, 217 P. (2d) 799, 802, (1950).

See also *Ross v. Johnson,* 22 Wn.(2d) 275, 155 P. (2d) 486 (en banc 1945); *Swanson v. Gilpin,* 25 Wn. (2d) 147, 169 P. (2d) 356. The facts here cannot be disputed by respondents in the absence of a cross-appeal. The court in this case has found that the PAW and the Government created an unreasonable risk of fire, knowing of the catastrophic consequences that might ensue. In the *Swanson case, supra,* the court said:

> "If the consequences of a negligent act were foreseen by the actor, for the purpose of determining proximate cause, it does not matter whether those consequences were immediate or remote." (169 P.(2d) 358)

III. ***The facts and the record conclusively establish that Government and PAW negligence at least contributed to the existence of the 1600-acre fire.***

These appellants concur with the Government and Rayonier that the trial court intended to hold

as a matter of law that no negligence of the Government or PAW caused or contributed to the damages suffered by appellants. However, these appellants do not think that in amending his findings of fact, Judge Boldt intended to withdraw his factual findings that such negligence at least concurred in the spread of the fire and hence contributed to the existence of the 1600-acre fire.

At pages 23 and 27 of the court's original written decision, the court had found "that by reason" of the Government's negligence and "because of the failure of United States employees to expeditiously perform such duty" the fire spread from the right of way to the 60-acre tract and then to the 1600-acre tract. These two findings were unequivocal in stating that the negligence of the Government actually caused the 1600-acre fire, and both are the only reasonable inference from overwhelming evidence. Both statements were ordered deleted (R. 242-43), however, because the trial court conceived it necessary to have direct, eyewitness evidence of such facts. Neither was nor is in conflict with the remaining finding of fact that United States negligence "proximately contributed" to the spread of the fire to the 1600-acre area. (R. 203.) Judge Boldt made the two deletions on or about September 16, 1958 (R. 238), almost two months after the meaning of his original findings were called to his attention (R. 244) and after it was specificaly pointed out that there is nothing "inconsistent because . . . it can proximately contribute without being the sole cause." (R. 293).

In the nature of things, the Judge said, "a poorly-kept right of way would, of course, be more likely to contribute to starting the fire or its spread after-

wards" (R. 268). The court agreed that "the fire was operating as a result of the negligence in a larger area than it would have been had there been no negligence" (R. 283-4) and that "there is certainly a reasonable inference that (negligence) had some bearing" on the progress of the fire (R. 295) even though he found it impossible to determine the precise extent of the increased hazard (R. 283-4).

In the light of Judge Boldt's comments and the care with which his memorandum decision was amended and the long period of time in which it was under review, appellants do not believe that he intended to alter his decision beyond the extent he actually did so.

IV. ***The Court below expressly determined that Finding XII. respecting weather conditions was only descriptive at best of the factor causing the flareup of the Heckleville fire.***

When requested to clarify the meaning of his findings relating to weather conditions, so as to recite:

> "That the wind, low humidity, and high temperature which occurred during the night of September 19 and 20, did not cause damage, and of themselves as independent forces did not damage the plaintiffs' property," the trial court said:
>
> "That would be the same statement of a simple self-evident fact that would be ridiculous to contain in a formal finding, and if that is all that is intended to be stated here, I don't see any point in stating it at all. It is perfectly apparent to everyone—or must be perfectly ap-

parent to everyone, if there wasn't any fire[1] you couldn't have burned anything." (R. 260).

The limited meaning of the court's findings of an "extraordinary *concurrence*" of three weather factors at a particular four-hour period (R. 233) and an "unforeseeable and fortuitous *combination*" (R. 236) is clearly established by the evidence. The language used closely follows appellants' evidence that where a combination or "group of several different items" of weather is considered "rarely . . . if ever, would they concur exactly as to time and elements" (Tr. 2162). The evidence is overwhelming, however, that "similar, not exactly the same" weather conditions were a frequent occurrence. (R. 2162).

On September 13, 1951, fire twice blew out of the 1600-acre area. The evidence is undisputed that weather conditions on that day were very similar, if not identical to those that occurred six days later.[2] Mr. Evans testified in a deposition in March of 1953 (R. 1212) there was a "strong east wind blowing" that day according to his diary (R. 1213), and that the east wind at least helped to cause the second flare-up on the evening of September 13 (Tr. 1221). Weather reports of September 13 showed that there were two sharp drops in humidity and

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[1]PAW and the Government's brief in the heading of their arguments on this finding properly characterize it as merely stating what caused "a flare-up in the 1600-acre area" (G. B. 50, PAW B 28). Fibreboard's brief, however, contrary to "self-evident fact" states that the wind and weather "caused the fire" (F.B. 29).

[2]G.B. at p. 50 says there was no evidence of this fact. It was undisputed at the trial and no explanation was ever made by respondents of any unusual factor causing or contributing to these two frightening harbingers of the disaster to follow.

that a northeast or east wind developed during the same period (Tr. 2164-65).

Regardless of all else, the fact that an east wind twice blew fire out of the 1600-acre area within six days of the final breakout gave Ranger Floe actual knowledge that the fire was still alive and capable of exploding under ordinary weather conditions.

James Anderson said that winds of 20 to 25 miles per hour in the late summer and early fall months "certainly wouldn't be impossible and wouldn't be so awful unusual" and that there are "apt to be winds" of that velocity in August and September. He agreed that such winds could be expected and agreed that "occasionally winds even stronger than that might be apt to occur." (Tr. 3237)[3]. Fibreboard's expert witness (Tr. 4387-88) agreed that humidity readings at a nearby weather station on September 20 had been exceeded many times (Tr. 4414) and that wind readings on that day were not unusual (Tr. 4415).

There is no material dispute that between September 19 and 20 various persons at places within 20 miles of Heckleville observed winds of some force. Some of them even characterized such winds, or gusts, as being over 39 miles per hour, which would constitute gale-force winds on some weather scales. Many persons testified as to high winds. There was, however, no testimony even approaching that required to show such winds were unfore-

[3]G.B. at page 51 quotes appellants' narrative statement of this witness' testimony, then charges that the witness did not use the precise words of the narrative statement. Such a misleading characterization of appellants' brief coupled with the argument made is chimerical dialectics. This, and much similar picayunish disputation attests to the purely verbal level of the Government's argument and position.

seeable—indeed, virtually every witness had personal knowledge of higher winds at approximately the same season of the year on several previous occasions. In the year 1951 alone, northeast or east winds have equalled or exceeded the 30-mile peak wind recorded on September 20 at Tatoosh Island some 54 times, five times in September and seven times in October (Tr. 2218).

V. *Reply to PAW Brief*

All but pages 35-37 of PAW's brief rest substantially upon evidence deemed to show that it was free of negligence—all of which was rejected by the trial court in making contrary findings. In the brief pages devoted to its breach of duty under Washington law it argues that proximate cause can be a jury question. Negligence in the maintenance of a railroad right of way is, however, a "cause in fact" and a legal cause of damage from a right-of-way fire equal in all respects to and indistinguishable from a fire caused by negligence in the operation of a railroad.

Firemen's Fund Insurance Co. v. Northern Pac. R. Co., 46 Wash. 635, 639, 91 Pac. 13, 15 (1907) adopted the obvious principle of *Thompson on Negligence,* § 270, that:

> "The removal of such combustible substances is quite as much a means of preventing the communication of fire from their locomotives as is the use of inventions for preventing the escape of fire from the locomotives themselves.
> . . .
>
> "The round statement of this doctrine is that, where a railroad company sets fire to the dry grass and other combustible materials which it

> has negligently suffered to accumulate on its right of way, and, without fault of the adjacent owner, to permit such fire to escape to his lands and burn and destroy his property, it will be liable to him for the damages, whether the escape of such fire was due to its negligence or not."

Insofar as proximate cause may be a jury question in a fire case, Washington courts have approved instructions to juries to determine that issue upon foreseeability; *Fireman's Fund Ins. Co. v. Northern Pac. Ry. Co.,* 46 Wash. 635, 91 Pac. 13; or upon evidence of communication from the defendant's fire and the elimination of other causes, *McCann v. Chicago, M. & S.P. R. Co.,* 91 Wash. 626, 158 Pac. 243 (1916)[4]; *North Bend Lum. Co. v. Chicago, M & S.P. R. Co.,* 76 Wash. 232, 249-50, 135 Pac. 1017, 1023-1024, (1913); *Wick v. Tacoma Eastern R. Co.,* 40 Wash. 408, 411, 82 Pac. 711, 812 (1905).

In this case, the court has expressly found that the damage that occurred was foreseeable, and the fire that caused the damage was the Heckleville fire, and that the fire started on the negligently maintained PAW right of way. There was nothing more for the trier of fact—whether jury or court—to do. Legal causation then follows as of course from the facts. There are only four combinations possible: a negligently maintained right of way and an accidental railroad fire; a negligently maintained right of way and a negligently loosed fire; a proper right of way and a negligently loosed fire, or

[4]"The burden was on plaintiff to trace defendant's fire to their own premises and show that their fire 'was caused by this particular fire *and none other.*' This instruction was pronounced sufficient, and nothing in the *North Bend case, supra,* is to be construed as requiring more." (at 91 Wash. 628, 158 Pac. 244).

a proper right of way and an accidental fire. Only in the last case has a railroad performed its duty of maintenance and operation so as to avoid liability for fire damage to others.

The legal question of proximate cause rests upon "considerations of justice and public policy".[5] If distinct and certain proof is required of the ignition and spread of fire through particular negligently maintained pieces of debris, it could never be offered in any fire case. Justice and public policy prohibit imposition of any such burden of proof whether it frees the wrongdoer under the heading of negligence or proximate cause.

VI. Reply to Fibreboard's Brief

Fibreboard's brief concedes that it took no independent action against the fire although it burned onto its lands through its slash, continued burning on its lands adjacent to more slash and ultimately escaped through that slash.

The evidence quoted at length in Fibreboard's brief (p. 18-28) establishes that Fibreboard willingly cooperated in paying its men for fighting the fire in and about its own slash on its own lands (F. B. p. 20) and that it would not have been desirable for it "to interfere and overrule, if you please, Forest Service." (F. B., 22) and that had Fibreboard taken any action at all there "would have been most certainly a passing of the buck" if something went wrong. (F. B., 25). Fibreboard's defense is nothing else. If it had thought of going to the Forest Service with the request that something further be done, it

[5]*Eckerson v. Ford's Prairie School District No.* 11, 3 Wn. (2d) 475, 482, 101 Pac. (2d) 345, 349, (1940).

would have stifled the idea, feeling if it did take any control it "might be sued now for more than we are." (Tr. 4458). In fact, however, Fibreboard's manager emphatically denied that landowners generally let the Forest Service take over fires on their own land. He said Fibreboard did "definitely fight fire on our own lands" and that as a general proposition Fibreboard and the Forest Service dealt on a mutual and equal basis:

> "we would give the Forest Service help whenever they needed it, and conversely, by the token, if we needed help on a fire, the Forest Service would help us." (Tr. 4477, 4478).

All of the 1600-acre area was in previously logged over land, 1300 acres of which had been logged within 10 years of 1951 (Tr. 4464). The fire in the 1600-acre area was stopped only when it reached green timber on the south (Tr. 4465), southwest and north (Tr. 4466) and by a pre-existing logging road on the east (Tr. 4466).

There is no dispute that Fibreboard's slash was a powder keg ready to explode into a fierce, uncontrollable fire broadcasting sparks over a wide area in the convection currents created by the fury of its burning (Tr. 2675, 3468, 3789-90, 4004, 4130-31). It was recognized two years before the breakaway that if fire ever got going in the slash it was going to be a big one (Tr. 4133-34).

Slash burning, of course, creates a hazard which is minimized by planning and close and adequate control measures. It must be done carefully and is expensive. Slash is and twice proved in this very case to be a major cause of the escape of fire—first throughout the 1600-acre tract and then to Forks. Fibreboard's slash was artificially created forest

debris deliberately maintained on the Olympic Peninsula contrary to a particular Washington statute making it unlawful to "expose any of the forest or timber on such land to the hazard of fire."[6] The Court below did not determine that the slash could not have been burned. The court could not approve Fibreboard's policy determination to run the risk of slash deterioration by time rather than disposal without adopting a standard of care contrary to the legislative determination of the standard of care required upon the Olympic Peninsula.

Great Northern Railway Co. v. Oakley, 135 Wash. 279, 237 Pac. 990 (1925) gave a landowner *indemnity* for a judgment it had paid when a fire started on lands in the vicinity" and "burned across this land" because of the presence of slash. The court affirmed a judgment over against the receiver of the insolvent purchaser of the timber, as a preferred claim. The court said it must be conceded that there was a tort at the foundation of the original judgment, that the insolvent had not breached the slash disposal statutes prior to insolvency because the slash "could not be successfully burned prior to that date." On the other hand, the receiver in possession only eleven months had breached the

[6]R.C.W. 76.04.450 provides:

Olympic peninsula area protection. All forest and timber upon all lands in the state of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire."

statutes and committed the tort because he failed to dispose of the slash "although the ordinary and safe burning season shortly ensued after his appointment as a receiver." His conduct could not be excused because "such burning would be a menace to the personal property of the insolvent, which was on the land" and which the receiver had a duty to conserve.

This case establishes the contrary of Fibreboard's contention, i.e.:

1. In Washington there is liability upon one across whose lands fire spread because of fire hazards there maintained. As to innocent third parties both the owner and person who unlawfully maintained slash are liable whatever their rights may be against each other.

2. The hazard and danger of burning slash is no excuse for violating the statutory command to do so. The legislature had decreed that such a controllable risk must be run to avoid much greater risks such as the Heckleville disaster.

3. The slash statutes do not impose liability without fault, but the burden is upon the party not in compliance with them to show that the slash "could not be successfully burned . . ." a contention Fibreboard did not seek to make.

If Fibreboard's policy arguments as to the relative merits of slash disposal as against the long-term hazard of deterioration are meritorious then legislative and administrative control of slash in the forests is virtually gone. If the common practice of corner-cutting loggers justifies refusal to abate slash, no logger need improve his practices nor follow the suggestions of state and federal protection

officers unless compelled to do so by court action at the instance of such officers—a tedious, costly and dangerously delayed remedy.

The Washington courts do not countenance such easy violation of its state laws.

Numerous cases arising under a wide variety of fire laws have imposed liability for the creation or maintenance of fire hazards or for breaches of specific commands of state or municipal fire control laws:

Conrad v. Cascade Timber Co., 166 Wash. 369, 7 P. (2d) 19 (1932).

Wood & Iverson, Inc. v. Northwest Lumber Co., 138 Wash. 203, 244 Pac. 712 (1926).

Mensik v. Cascade Timber Co., 144 Wash. 528, 258 Pac. 232 (1927).

Galbraith v. Wheeler-Osgood Co., 123 Wash. 229, 212 Pac. 174 (1923).

Kuehn v. Dix, 42 Wash. 432, 85 Pac. 43 (1906)

Babcock v. Seattle School District No. 1, 168 Wash. 557, 12 Pac. (2d) 752 (1932)

Seibly v. Sunnyside, 178 Wash. 632, 35 Pac. (2d) 56 (1934)

Appellants cannot reconcile the admitted facts of the hazard of slash and its substantial contribution to the spread of the fire with the unexplained fiat below that Fibreboard was not negligent in deliberately breaching numerous statutes designed to avert the very tragedy that occurred.

VII. Answer to Arguments of the Government upon Issues not Involved in this Appeal

The Government has not challenged any Findings of Fact, Conclusions of Law nor has it cross-

appealed. It does, however, argue at length issues foreclosed to it and four times refers to and discusses the previous decision of this Court as establishing some material facts or law relevant at this time. The prior appeal involved only allegations of the complaints—since superseded by pre-trial orders—and there were then no findings of fact or determination of Washington law made by the trial court.

The trial court at this stage of the proceedings has found that:

> "A study of all the authorities compels the conclusions that in the heavily forested State of Washington . . . the state law places upon an owner of land containing timber or in the immediate vicinity of timber lands, the duty to exercise reasonable care concerning maintenance of his premises as to fire precautions, even though exclusive possession and use of the land be vested in another by license, lease, easement or other contract." (R. 193).

The District Court, after examining the exhibits and hearing the testimony at the trial and knowing the acts, conduct and practical interpretation of agreements of the parties found as a fact that the PAW did not have exclusive possession and use of the right of way, but that the United States:

> ". . . retained title to all railroad property including the right of way, for purposes not inconsistent with the use thereof by PAW for railroad purposes, including the right of access to fight fire thereupon and to abate fire hazardous conditions thereon." (R. 229, Amend. Findings of Fact III.).

VIII. CONCLUSION

The Government's argument is directed mainly to arguing facts found against it in the trial and to lint-picking at the language or grammar of appellants' briefs.[7]

Fundamentally the factual issues involved in this appeal were settled by the trial court insofar as facts are susceptible of proof and determination in any way known to the law. If the trial court could upon those facts refuse to apply the universal rule of "legal cause" it is only because some overriding public policy should immunize these particular defendants from the consequences of their acts. The trial court articulated no conceivable justification for such policy.

Sovereign immunity offers no excuse if it ever was a meritorious defense to just claims of a citizen. The ruling below bars even the Government from recovery or seeking to recover its own damages from the PAW. The magnitude of the disaster and the sums that PAW and the Government should pay are only a slight portion of the fire protection the Government and Washington citizens will lose and the damages they will suffer if the negligent action here found to exist has no legal consequences.

---

[7]Only the Government found it necessary to make a lengthy and argumentative statement of facts or to make assertions throughout its brief that there was anything misleading or erroneous at the various points it so characterizes the opening briefs of appellants. A brief description of the factious nature of the criticisms of Arnhold set forth in the Government's brief at pp. 22-24 is set forth in an appendix hereto—the nature of the criticism being such that it cannot be ignored but so trivial in its bearing upon the merits of the appeal that reply is not worthy of incorporation in the brief itself.

Years of neglect and lackadaisical attention to duty by the District Fire Ranger and the PAW on August 6 and 7 dealt both appellants and the Government a crushing blow on September 20, 1951.

No consideration of justice or public policy justify discharging the negligent by a novel application of any doctrine of proximate cause, whether characterized as a finding of fact, conclusion of law or burden of proof. Justice and public policy require that citizens and the Government alike should be under a duty to avoid the hazard of forest fires and take quick and proper action against them when they occur. If large forest harvesters such as Fibreboard do not meticulously observe fire control measures, no one else will do so. Fibreboard's deliberate violation of slash laws was clear. The legislature has determined that the hazard of uncontrollable slash fires requires slash abatement on the Olympic Peninsula whenever it is possible to do so. Any supposed competing policy such as promoting forest fertility or avoiding the risk of a planned, supervised and controlled slash fire are proper arguments to address to the legislature but are not relevant here. If slash deterioration in particular places under particular circumstances is proper practice foresters may determine that fact and certify to it. A unilateral determination by a logging company to run that risk cannot escape motivation by the immediate cost of slash disposal as opposed to the prospective damage to neighbors. The home and farm owners appealing this decision should not bear the entire burden of fire damage because Fibreboard gambled that it might harvest its timber crop a few years earlier a half a century from now.

Appellees should be held responsible for the results of their negligence.

Dated at Seattle, Washington, this 20th day of March, 1960.

Respectfully submitted,

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IX. APPENDIX "A"

I.

The Government's many hortative assertions that appellants' brief is "unsupported by the record," "taken out of context" and gives "an inaccurate picture" (G.B. 21), requires the following brief rebuttal:

Of seven instances, four refer to appellants' argument and not to any statement of facts (par. d, e, f and g) and are themselves argumentative at best. Several relate to findings of the court. Thus the court expressly found that Ranger Floe, on August 6, 1959, knew or should have known that the Heckleville fire might burn to the Pacific Ocean (R. 232, Amend. Findings of Fact IX., see also R. 197). The court commented that "There is no question about that." (R. 249).

Next, the Government erroneously quotes one fire boss' testimony as refutation of another's testimony. The witness quoted by the Government as establishing the fire jumped a completed fire line wet down on both sides in fact said that the fire jumped over his line at 2:30 while he was in the process of constructing a bulldozer line and while he was wetting the line down (Tr. 1076-77). The acts of this witness and others was the basis for the court's finding of Forest Service negligence in not having proceeded earlier and more vigorously in attacking the fire.

Mr. McDonald was the first person at the 1600-acre area after the fire escaped into the Fibreboard slash and before it made the jumps towards Forks. Appellants' brief clearly so states and accurately

sets forth his eyewitness observations of what occurred at that time and place.

In chivvying appellants for failing to note that an exhibit mentioned was not admitted into evidence, the Government fails to note that the quotation in appellants' brief was an exact quotation of a question asked and answered on oral examination, and rests not a whit upon the written exhibit itself.

Both the Government and PAW complain of a passing reference to Government negligence continuing up to the time the fire was controlled in the 1600-acre area. The court so characterized the meaning of his findings, saying in his opinion:

> "The Court has found the Forest Service negligent in its fire-fighting action during the initial period, August 6-10, in which interval the fire reached Fibreboard lands." (R. 189).

Nos. 16367 and 16368

In the United States Court of Appeals for the Ninth Circuit

ARTHUR A. ARNHOLD, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL., APPELLEES

RAYONIER INCORPORATED, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION OF THE UNITED STATES FOR REHEARING

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION OF THE UNITED STATES FOR REHEARING

The decision of this Court was filed on October 26, 1960. By order of the Court, the time within which to file a petition for rehearing was extended to December 24, 1960. The Government suggests that these cases should be reheard *en banc,* primarily because of the conflict between certain critical holdings in this Court's opinion and rulings on the same issues in an earlier appeal of these cases.

STATEMENT

These actions were brought by appellants in the United States District Court for the Western District of Washington against the United States under the Federal Tort Claims Act to recover damages for property losses allegedly sustained by reason of the negligence of the United States in connection with a forest fire on the Olympic Peninsula of Washington in 1951.

In summary, the complaints alleged that the fire had been started on August 6, 1951, by a Port Angeles and Western Railroad train on its right-of-way which ran across the Olympic National Forest; that the United States Forest Service had entered into an agreement with the State of Washington to render fire protection in an area which included the land pertinent to this case; that the Government undertook to fight the fire, which spread first to a 60-acre tract and then to a 1600-acre tract; that the fire was brought under control within the 1600-acre tract by August 11, 1951, where it smoldered until September 20, 1951; and that on the latter date it escaped from that area onto lands including those of appellants. The complaints charged, so far as relevant to this petition, that the negligence of the United States consisted in general of failure to extinguish the fires by utilizing insufficient manpower, tools, equipment, water and supplies before the forest fire reached appellants' property.

(1) *Prior Proceedings.* On March 1, 1954, the district court dismissed the complaints with prejudice.

On September 1, 1955, this Court affirmed.[1] *Rayonier Incorporated* v. *United States,* 225 F. 2d 642; *Arnhold, et al.* v. *United States, et al.,* 225 F. 2d 650.

In affirming the dismissals, this Court held that, on the allegations viewed in terms of Washington law, the sole proximate cause of the damage to appellants' property was the recurrence of the fire on the 1600-acre tract, and that liability could not be predicated upon alleged acts or omissions of agencies of the Government occurring prior to the containment of the fire on that tract. 225 F. 2d at 644.

With respect to the liability of the United States for its asserted negligence in failing to prevent the spread of the fire from the 1600-acre area, the Court held that the Forest Service was fighting the fire in the capacity of public firemen, and that under the Supreme Court's decision in *Dalehite* v. *United States,* 346 U.S. 15, the Government was not liable under the Federal Tort Claims Act for failure to extinguish the fire. 225 F. 2d 645–646.

In *Rayonier Incorporated* v. *United States,* 352 U.S. 315, the Supreme Court vacated the judgments, holding simply that the United States could be held liable under the Tort Claims Act for negligence upon the part of its public firemen. It did not pass upon the appellate court's interpretation of Washington law regarding proximate causation. The cases were remanded to permit the district court to determine

[1] The panel of this Court which heard the prior appeal consisted of Judges Bone, Orr and Hastie. The unanimous opinion of the Court was written by Judge Orr.

"whether the allegations and any supporting material offered to explain or clarify them would be sufficient to impose liability on a private person under the laws of the State of Washington." *Id.* at 321.

(2) *Subsequent Proceedings.* After trial, the district court determined that, while the Government was negligent in its initial attack on the fire, this negligence was not the proximate cause of appellants' damage. The record shows (and Judge Boldt found), *inter alia,* that the fire was started on August 6, 1951, by a Port Angeles and Western Railroad (P.A.W.) locomotive on its right-of-way, which was a 100-foot strip running across certain forest lands on the Olympic Peninsula (Finding IV, R. 230); that on the same day, the fire spread to a 60-acre tract owned by the United States, and on August 7, 1951, it spread to a 1600-acre tract owned in part by the United States and in part by Fibreboard Products, Inc. (Finding IV, R. 230; Findings X and XI, R. 232–233); that the United States had entered into a cooperative agreement with the State of Washington pursuant to 16 U.S.C. 572 and R.C.W. 76.04.400, under which the Government was responsible for fire protection on all non-government owned lands material hereto (Finding V, R. 230); that the United States undertook to fight the fire, which, on August 10, 1951, was confined and controlled in the 1600-acre tract, where mop-up activities continued for the next 40 days (R. 198; Findings XI and XII, R. 233); and that in the early morning of September 20, 1951, an extraordinary concurrence of high temperature, low humidity and gale

force wind caused a flare up of the fire within the 1600-acre area and the rapid spread thereof out of control, with resulting damage to appellants' property (Finding XII, R. 233–234).

On the basis of its evidentiary findings, the district court made several crucial ultimate findings:

> (1) that, although the Forest Service had not exercised reasonable care in its initial attack upon the Heckleville fire, it was not established either (a) that, had such negligence not existed, the fire would have been contained in the 60-acre area, or (b) that there was any causal relationship between the negligence and the ultimate existence of fire in the 1600-acre area (Finding XVI, R. 234–235);
>
> (2) that the United States was not shown to have failed to use reasonable care in its fire fighting activities, or in any other respect, after August 7 (Finding XVII, R. 235);
>
> (3) that the sole proximate cause of the alleged damage to appellants' property was the unforeseeable and fortuitous combination of wind and weather conditions which occurred on September 20 (Finding XVIII, R. 235–236).

Pursuant to these findings, the district court concluded that no negligence of the United States proximately caused or contributed to any of the damages claimed by appellants; and it entered judgments dismissing the actions with prejudice. This Court has vacated the judgments and remanded the cases.

GROUNDS FOR REHEARING

Following a lengthy trial, the district court made detailed findings to the effect that it had not been

established that any negligence on the part of the United States was causally related to the damage to appellants' property. Without purporting to disturb the basic findings of the district court, this Court has reversed its judgments.

Crucial to this reversal is the Court's determination that the district court could not be deemed to have found that appellants had failed to establish that the negligence of the Government was a cause in fact of the damage. We respectfully submit, however, that such a finding was made and that, in his supplementary oral remarks, Judge Boldt expressly stated that he was of that view. If, notwithstanding Judge Boldt's comments, this Court remained in doubt as to the import of his findings, it should have at least given him the opportunity to resolve the doubt before holding, on the basis of its construction of the findings, that Judge Boldt erred in his application of Washington law.

Equally crucial to the result reached by this Court is its view of the Washington law pertaining to legal cause. This view is not only in error, but, more important, is plainly opposed to that of the panel of this Court which heard the prior appeal (and which included a Washington judge). The intra-circuit conflict should be eliminated by *en banc* consideration of the question.

1. This Court recognizes in its opinion that the determination of whether or not a breach of duty is a "cause in fact" of the asserted damage involves a finding of fact. But it does not accept, as such, what

we think can be considered only as a finding by the district court that the Government's negligence in its initial attack on the fire was not a "cause in fact" of appellant's loss. Rather, the opinion states (p. 4) that the Court does not "believe that the district judge could have ever intended to make any such finding," since the fire which caused the losses in question could be traced back to the Heckleville spot fire (Slip Op., p. 4). The Court failed to take into account, however, that the United States did not start that spot fire and that the question, therefore, is not whether, had there been no fire at all, appellants' property would have been damaged. When this consideration is given recognition, it becomes plain, we submit, that the findings reflect the district court's conclusion that "cause in fact" had not been proven, and that this conclusion was wholly warranted.

In order to establish "cause in fact," appellants were required under Washington law to show that the negligence of the United States was "a necessary antecedent of the consequences for which recovery is sought, that is, when the injury would not have resulted 'but for' the act in question." *Eckerson* v. *Ford's Prairie School Dist. No. 11,* 3 Wn. 2d 475, 482, 101 P. 2d 345.

So far as the matter of the liability of the United States is concerned, "the act in question" was the Government's conduct intermediate the start of the fire by the railroad and its control. Consequently, appellants clearly had the burden of proof to show

that the fire would not have been in the 1600-acre area had the Government not been negligent. It follows, contrary to this Court's ruling (Slip Op., p. 6), that the district court committed no "error of law" in requiring appellants to meet this burden as reflected in the court's Finding XVI (R. 235). And in stating in this finding that appellants had failed to carry such burden, the district court to all intents and purposes found that the Government's negligence was not a "cause in fact" of appellant's damage:

> Whether, or at what time and place the fire might have been contained or suppressed within said area but for such negligence is a matter of speculation and cannot be determined as a reasonable probability under the evidence. It has not been established by a preponderance of the evidence that had such negligence not existed, the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area (R. 235).

Although there is no ambiguity in Finding XVI, reference to the following observation made by Judge Boldt at the time that appellants were arguing their motions for amendment of the findings is pertinent:

> In my judgment, under the evidence and considering the conditions existing at the time, it is impossible for me or anyone else to say that the fire could have been contained or suppressed even with the ultimate action by the Forest Service during [the "initial fire period" on August 6 and 7]. I will readily agree that one per-

> son might think that the fire could have been contained and even put out. But I think there is a reasonable inference from the evidence for another reasonable mind to conclude that it couldn't have been under the conditions existing at that time considering the extremely difficult and hazardous conditions with respect of fire in existence at that time. (R. 292.)

Plainly, appellants had not proved to the satisfaction of the district court that "but for" the negligence of the Government in its initial attack, the fire would have been extinguished. Accordingly, this Court's statement (Slip. Op., p. 6) that "[i]t is perfectly clear from the court's findings that, had the United States not been initially negligent the Heckleville spot fire would have been extinguished before it finally spread" was not warranted.

In sum, the judgments below were not susceptible to reversal on the ground that the district court had found "cause in fact" to have been established. Effect should have been given to the district court's expressed opinion that appellants had not shown that, had the Government not been negligent during the initial fire period, the damage would have been avoided (R. 292). It might be added that, if there could still have been doubt as to the import of Finding XVI, that doubt should not have been resolved in such a way as to call for the conclusion (reached by this Court on its construction of the finding) that an experienced Washington district judge erred in the interpretation and application of the law of his own State to the facts as found. At the very least, the district judge should have been af-

forded the opportunity to clarify any possible ambiguity in his factual determinations.

2. In any event, appellants had the burden of proving not only cause in fact but also proximate, or legal, cause. This Court has held that such cause existed. The district court, on the basis of evidentiary findings which were not disturbed by this Court, found to the contrary. More importantly, the panel which heard the prior appeal held that, in the circumstances of this case, proximate cause is lacking as a matter of law. As above noted, this intra-circuit conflict respecting the Washington law of causation in itself warrants rehearing *en banc.*

a. The district court recognized in its memorandum opinion (R. 181), that appellants had the burden under Washington law of proving not only negligence but also proximate cause. See *Wilson* v. *N.P. Ry. Co.,* 44 Wn. 2d 122, 265 P. 2d 815; *Evans* v. *Yakima Valley Transportation Co.,* 39 Wn. 2d 841, 239 P. 2d 336; *Carley* v. *Allen,* 31 Wn. 2d 730, 198 P. 2d 827. Consequently, it does not follow from the mere fact that the district court found negligence in the initial attack upon the fire that such negligence was the proximate cause of appellants' damage. Nevertheless, in its opinion (p. 4), this Court stated that "when the district court finds District Ranger Floe to be initially 'negligent', we take it he means not negligent in the abstract, but negligent in the sense that such negligence subjected appellants' property to an unreasonable risk of a fire loss." And, further (Slip Op., p. 6), that given such negligence, "it seems pointless to say

* * * his negligence was not the 'proximate cause' of the ultimate loss."

We submit that in joining negligence and proximate cause in this fashion the Court misconceives the applicable Washington law on both burden of proof and proximate cause. That the district court properly considered appellants' two-fold burden of proof is clear, since it found, (1) that appellants had failed to establish any "causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area" (Finding XVI, R. 235); (2) that there was no negligence "in mop-up or other firefighting activities after August 7" (Finding XVII, R. 235); and, (3) that the "sole proximate cause of the damages to [appellants] * * * was the unforeseeable and fortuitous combination of wind and weather conditions occurring on September 20, 1951" (Finding XVIII, R. 235–236).

Further, the district court's statement that Floe knew or should have known that a fire in that area which was not extinguished might burn continuously and progressively in any direction (R. 232) was simply a finding of general foreseeability with respect to fire. It was not a finding of proximate cause; *i.e.,* that *after* the fire was confined and controlled, damage to surrounding property was reasonably foreseeable.

What is lacking here is the degree of proximity which must "exist between the act done or omitted and the harm sustained, before legal liability may be predicated upon the 'cause' in question." See *Eckerson* v. *Ford's Prairie School Dist. No. 11, supra,* 3

Wn. 2d at 482. While no one would deny that there is a relationship between the fire started by the railroad and appellants' loss, this is not the test of the Government's ultimate liability. The Government did not start the fire. Nor was it Government negligence that permitted the escape of the fire from the 1600-acre area. For these reasons, the question is whether the Government's conduct on August 6th and 7th, intermediate the start and the control of the fire, was a "cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produced the event, and without which that event would not have occurred." *Eckerson, supra,* at p. 482. Viewed in the light of this criteria, the Government's negligence was not the proximate cause of appellants' damage. We commend particularly to the attention of the Court the discussion of the Supreme Court of Washington in *Wilson* v. *N.P. Ry. Co., supra,* pages 126, *et seq.,* which case the district court cited in connection with its discussion of proximate cause (R. 181).

b. In their complaints, appellants alleged that the fire was contained and controlled in the 1600-acre area prior to the date upon which it spread to their property. On the prior appeal, a panel of this Court expressly held that, accepting this allegation as true, the sole proximate cause of the damage was the recurrence of the fire [225 F. 2d at 646]:

> * * * we read the amended complaint in its entirety as picturing a situation wherein the operation occurring after the fire had spread to the 1600-acre plot is determinative of the liability of the Government, if any. The fire,

> after reaching the 1600-acre tract, smoldered for more than a month, flared up again and reached appellant's property. In our opinion it was this recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the acts or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated. * * *
>
> On [the alleged] facts liability may not be predicated on conduct occurring before the spread of the fire to the 1600-acre tract.

Without saying so, the opinion of this Court now under consideration repudiates this flat holding of Judges Bone, Orr and Hastie. The evidence indisputably bears out the allegation that the fire was contained and controlled in the 1600-acre area. Consequently, under the prior ruling, the sole proximate cause of the damage was the recurrence of the fire. And the district court found (and its finding was not disturbed by this Court) that this recurrence was not occasioned by negligence upon the part of the Government but, rather, by extraordinary and unforeseeable weather conditions.

Moreover, in thus implicitly rejecting the view of the Washington law on proximate cause which was subscribed to in this case by two Washington jurists (Judge Bone on the earlier appeal and Judge Boldt in the court below), this Court did not refer to any Washington decisions dealing with proximate causation.

We respectfully submit that the proximate cause holding in the earlier appeal should be treated as the "law of the case", since it is entirely consistent with Washington law on proximate cause, and evidence subsequently presented does not require a different result. The fact that the Supreme Court vacated the judgment in *Rayonier Incorporated* v. *United States,* 352 U.S. 315, does not militate against this conclusion, since that Court did not purport to question the validity of that portion of Judge Orr's opinion which dealt with proximate cause. In any event, the patent intra-circuit disagreement which now exists should be settled.

CONCLUSION

For the foregoing reasons, it is respectfully urged that rehearing be granted *en banc* and that on further consideration the judgment of the district court be affirmed.

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CHARLES P. MORIARTY,
United States Attorney.
ALAN S. ROSENTHAL,
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Attorneys.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

KATHRYN H. BALDWIN,
Attorney, Department of Justice.

U S. GOVERNMENT PRINTING OFFICE: 1960

No. 16367

United States Court of Appeals
For the Ninth Circuit

ARTHUR A. ARNHOLD, ET AL., *Appellants,*
and
TRAVELERS INDEMNITY CO., a Connecticut corporation, et al., *Additional Appellants,*
vs.
UNITED STATES OF AMERICA and PORT ANGELES & WESTERN RAILROAD COMPANY, INC., a Delaware corporation, *Appellees,* and
FIBREBOARD PRODUCTS, INC., a Delaware corporation, and A. R. TRUAX, Trustee in Reorganization, *Additional Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

PETITION FOR REHEARING ON BEHALF OF PORT ANGELES AND WESTERN RAILROAD COMPANY, AND A. R. TRUAX, TRUSTEE IN REORGANIZATION, AND FOR REMANDING FOR ADDITIONAL FINDINGS

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THE ARGUS PRESS, SEATTLE

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To the UNITED STATES COURT OF APPEALS for the NINTH CIRCUIT and to POPE, MAGRUDER and MERRILL, HONORABLE JUDGES THEREOF:

Come now the Port Angeles and Western Railroad Company and A. R. Truax, Trustee in Reorganization, Appellees, hereinafter referred to jointly as the railroad, and present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

I.

That a determination of the liability of the parties to this cause must necessarily depend upon the law of the State of Washington, *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, 114 A.L.R. 1487. However, no Washington cases were cited by the Court in reaching its decision, the Court having said on page 5 of its Opinion filed herein on October 26, 1960, "We may also take it, though we have no Washington cases that we can cite, that the State of Washington does not, as does the State of New York, use the doctrine of 'proximate cause' somewhat arbitrarily to cut off a liability that would otherwise rest upon a negligent actor." It is contended that the Supreme Court of the State of Washington has rendered a number of decisions, of which *Scobba v. Seattle,* 31 Wn.2d 685, 198 P.2d 805, is but an example, which should control the issue of proximate cause herein. Since the Court has held that the railroad's liability arises from the negligence of the United States of America, a holding which we believe we should not have anticipated, it is believed that a rehearing should be granted to allow the railroad to present fully the Washington law on this issue, which was not raised in oral argument before this Court.

II.

That under the Washington case law, as exemplified by *Scobba v. Seattle, supra,* a plaintiff must prove to the satisfaction of the trier of fact that his damages would not have occurred "but for" the negligence of the defendant. This Court said on page 6 of its Opin-

ion, "But it is perfectly clear from the court's findings that, had the United States not been initially negligent, the Heckelville spot fire would have been extinguished before it finally spread . . . " It is submitted that this statement is inconsistent with the following quoted portion of the District Court's Amended Finding XVI: "Whether, or at what time and place, the fire might have been contained or suppressed within said area (the 60-acre area) but for such negligence is a matter of speculation and cannot be determined as a reasonable probability under the evidence. It has not been established by a preponderance of the evidence that had such negligence not existed, the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area." Contrary to the statement of this Court on page 6 of its Opinion, where it is said: "The burden of proof is certainly not upon the plaintiff to show that, had the defendant not been negligent at the start, the fire would have been contained within any particular space," under Washington case law, the plaintiff does have this burden of proof.

III.

That in its opinion filed the 26th day of October, 1960, the Court, acting on the assumption that the railroad was a party to the cooperative agreement under 16 U.S.C. § 572 and R.C.W. 76.04.400, held the railroad liable on the grounds that it had a nondelegable duty, as a landowner with knowledge of a fire burning on its land, to exercise ordinary and rea-

sonable care to prevent its spread and that its duty in this regard was breached by the negligence of the United States of America, its "delegatee." However, this holding should be corrected in that the record establishes several facts, some of which were of no importance to the District Court's holding, but which become particularly significant under the holding of this Court. These facts, not fully brought out by the briefs filed herein or by argument before this Court, establish that: (1) The Heckelville fire was found by the District Court not to have been negligently started, which finding this Court has not disturbed; (2) The Forest Service discovered the Heckelville fire, sent its men to control and suppress it, and assumed control of fire fighting activities, before the railroad had knowledge of that fire, and without the railroad having delegated, either expressly or impliedly, the Forest Service so to act; (3) The Forest Service's response to the Heckelville fire was as a volunteer, and public fire fighter, having discovered the fire, and in fulfillment of its duties as a landowner, the government owning the fee over which the railroad's right-of-way ran, as well as the adjoining land, and, additionally, in fulfillment of its obligations under the cooperative agreement, to which the railroad was not a party; (4) When the Forest Service men reached the scene of the fire, the fire had already spread from the railroad's right-of-way to the government-owned land adjoining it, and all subsequent danger of spread was not from the right-of-way, but from the lands exclusively owned and controlled by the government; (5) The railroad

had no knowledge of the existence of the Heckelville fire until the danger of spread of that fire was from the lands of the government, at which time the railroad took, independent of the Forest Service of the United States, prompt and immediate action, within the limitations of its capabilities, to control and suppress the fire on and along its right-of-way, additionally lending what assistance it could to the Forest Service.

IV.

Because of the far-reaching implications of a decision in this case and its effect on the rights and duties of all landowners within the State of Washington, as well as on the rights and duties of the United States of America, it is earnestly believed that this case merits a rehearing *en banc.*

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted, respectfully suggested that it be granted *en banc,* and that the judgment of the District Court be, upon further consideration, affirmed, and that in any event, the case be remanded to the District Court for additional findings which are needed in light of this Court's decision.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

DONALD A. SCHMECHEL and ROGER L. WILLIAMS, of Counsel for Appellees Port Angeles & Western Railroad Company, Inc. and A. R. Truax, Trustee in Reorganization, hereby certify that in their judgment the accompanying Petition for Rehearing on behalf of said Appellees is well founded and that it is not interposed for delay.

Donald A. Schmechel

Donald A. Schmechel

Roger L. Williams

Roger L. Williams

No. 16367

United States Court of Appeals
For the Ninth Circuit

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vs.
UNITED STATES OF AMERICA; PORT ANGELES & WESTERN RAILWAY COMPANY, INC., a Delaware corporation; FIBREBOARD PRODUCTS, INC., a Delaware corporation, and A. R. TRUAX, Trustee in Reorganization, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

PETITION OF APPELLEE, FIBREBOARD PRODUCTS, INC., A DELAWARE CORPORATION, FOR REHEARING AND TO REMAND TO THE DISTRICT COURT TO CLARIFY CERTAIN FINDINGS OF FACT PERTAINING TO THIS APPELLEE

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United States Court of Appeals
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PETITION OF APPELLEE, FIBREBOARD PRODUCTS, INC., A DELAWARE CORPORATION, FOR REHEARING AND TO REMAND TO THE DISTRICT COURT TO CLARIFY CERTAIN FINDINGS OF FACT PERTAINING TO THIS APPELLEE

To the UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT and to POPE, MAGRUDER and MERRILL, HONORABLE JUDGES of said COURT:

Comes now appellee, Fibreboard Products, Inc., a Delaware corporation, hereinafter referred to as Fibreboard, and petitions the court for a rehearing of the above entitled cause. This appellee also requests that the cause be remanded to the district court for clarification of Findings of Fact referred to on page 7 of the Division opinion in which it is said the district

court found the Forest Service negligent "in its fire fighting action during the initial period, August 6-10, in which interval the fire reached Fibreboard land." This request for a remand to the district court is suggested because the opinion filed October 26, 1960, overlooks the fact that the district court specifically found that the negligence of the Government referred to by the district court in its findings was confined to the dates August 6, and August 7 until such time as the fire went out of the Government's 60-acre tract upon Fibreboard lands. Fibreboard respectfully suggests that this cause should be reheard *en banc* for the reason that it not only involves a large amount of money but establishes far-reaching principles materially affecting and controlling future conduct of landowners who are or may be in the same or similar position of Fibreboard in this case. It also must affect the future conduct of governmental agencies and private landowners in connection with their entering into co-operative agreements such as is referred to in the Division opinion as well as affecting the conduct of said governmental agencies in the performance of their duties created by such co-operative agreements.

The Division opinion holds Fibreboard responsible to third parties by reason of a fire that came upon its land because of no wrongful act or omission on its part. It is held responsible for negligence of public firemen committed before the fire came upon Fibreboard land. The Division opinion holds Fibreboard responsible for negligent acts of the Forest Service personnel who acted as public firemen which negligence this court and

the district court say resulted in the fire going upon and damaging Fibreboard land. Fibreboard as a private owner is held responsible for the negligence of the Government upon whom it had a right to rely as an adjoining land occupier and as a fire fighting agency. As was said by the U.S. Supreme Court in its review of this cause, *Rayonier, Inc. v. United States,* 352 U.S. 315:

> "Petitioners (Fibreboard is in the same position as appellants Rayonier and Arnhold) were aware of this contract and relied on the Forest Service to control and put out the fires involved in this case."

The contract referred to was the Co-Operative Agreement referred to on page 3 of the Division opinion as follows:

> ". . . The United States had undertaken to protect all non-United States owned land in the region from fire and to take 'immediate vigorous action' to control all fires breaking out in the protected area."

Fibreboard was in the protected area.

In spite of its right to rely on the contract above referred to, Fibreboard is held responsible for appellants' damage caused by the Government's breach of duty committed on government land as a land occupier upon whose land the fire started and because of the Government's failure to perform as required by the Co-Operative Agreement.

Fibreboard is held liable regardless of the fact that the record shows and the Supreme Court of the United

States said in *Rayonier, Inc. v. United States,* 352 U.S. 315, that:

> "Shortly after the fire started United States forest personnel appeared and took exclusive direction and control of all fire suppression activities."

By virtue of the Co-Operative Agreement made pursuant to 16 U.S.C. 572, and R.C.W. 76.04.400, the State of Washington had substituted the Forest Service as public firemen for county and district fire wardens. Fibreboard as a private landowner would have had no duty, power or right to control county or state fire wardens who would have been in charge of fire fighting in this area in the absence of the Co-Operative Agreement. Neither did Fibreboard have any right, duty or power to control the activities of the United States Forest Service personnel who assumed exclusive direction and control of all fire suppression activities out of which this litigation arises. It is submitted that this cause should be reheard for the following reasons:

Summary of Reasons Rehearing Should Be Granted to Fibreboard and Case Remanded for Clarification of Any Uncertainty in Findings Pertaining to This Appellee

I.

The Division opinion holds Fibreboard liable for the Government's negligence. This theory or issue of "delegatee" and delegator or master and servant as between the Government and Fibreboard was first injected into the case by the Division opinion. No claim has ever been made by any party that Fibreboard be

held liable for and through negligent conduct of the Forest Service (See page 6, *infra*).

II.

The Division opinion mistakenly holds that the District Court found Government negligent August 6-10. Specific findings of District Court limit negligence of Government to August 6th and August 7th until fire escaped from Government land to Fibreboard land. This case should be remanded to District Court for additional findings to clarify any possible uncertainty on this question (See page 7, *infra*).

III.

Fibreboard had right to rely on Government to fight fire with due care and to take "immediate, vigorous action" to control the fire as required by the terms of the Co-Operative Agreement. This same right of reliance by Fibreboard also stemmed from the fact that the Government owned the adjoining lands where the 60-acre fire started and from which the fire spread onto Fibreboard land mid-afternoon of August 7, 1951 (See page 10, *infra*).

IV.

The Division opinion is based on wrong principles in applying the doctrines of proximate cause and burden of proof. The Division opinion is in conflict with Washington law on these points or doctrines (See page 12, *infra*).

V.

The Division opinion goes behind and beyond the Findings of Fact as to Fibreboard (See page 16, *infra*).

VI.

The Division opinion, in attaching liability to Fibreboard, applies what this court once referred to as a harsh rule (See page 17, *infra*).

See: *Rayonier, Inc .v. United States,* 225 F.(2d) 642, where this court said:

> "We fail to find a case wherein a landowner was held liable to third parties for failure to fight a fire spreading across his land from the land of another. . . . To hold an intermediate landowner liable for damage to property caused by fire passing over his land, to all parties subsequently damaged notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule."

I.

The Division opinion holds Fibreboard liable for the Government's negligence. This theory or issue of "delegatee" and delegator or master and servant between the Government and Fibreboard was first injected into the case by the Division opinion. No claim has ever been made by any party that Fibreboard be held liable for and through negligent conduct of the Forest Service.

In holding Fibreboard liable for or because of the Government's negligence, the Division opinion injects a theory into the case that has not heretofore been asserted or contended for by any party. This matter was not considered by the district court, because there was no issue before it on this point. It is well settled that a new issue should not be injected into the case by the

reviewing court to sustain a reversal as distinguished from an affirmance of the district court. To hold otherwise would subject a litigant to liability on a theory against which it had no opportunity to defend. This issue having been raised by the Division opinion for the first time in the history of this litigation, Fibreboard should now be given an opportunity to be heard on this new issue as it applies to Fibreboard.

Holding Fibreboard liable because of negligence of Government personnel is beyond the issues heretofore framed as they pertain to Fibreboard and as outlined by the pleadings, the pre-trial order, and the assigned points on appeal relied on by appellants. We therefore respectfully urge that Fibreboard should be given an opportunity to defend against this new theory first injected into the case by the Division opinion.

II.

The Division opinion mistakenly holds that the District Court found Government negligent August 6-10. Specific findings of District Court limit negligence of Government to August 6th and August 7th until fire escaped from Government land to Fibreboard land. This case should be remanded to District Court for additional findings to clarify any possible uncertainty on this question.

On page 7 of the Division opinion, it is stated that:

> "The district court found the Forest Service negligent 'in its fire fighting action during the initial period August 6-10, in which interval the fire reached Fibreboard lands'."

This statement overlooks the fact that the above quo-

tation is taken from the court's memorandum decision (R. 189). It overlooks the fact that this statement was made in the district court's memorandum decision where the court had arbitrarily grouped certain periods of the fire for discussion purposes (R. 191, 192). The period of August 6-10 was referred to as the time elapsing from the time the Heckelville fire was first discovered until it was contained in the 1,600-acre area. It overlooks the fact that subsequent to the memorandum decision the district court entered specific Findings of Fact and Conclusions of Law and Amended Findings of Fact and Conclusions of Law in which it found and concluded that the Government's negligence was committed on August 6 and 7 while the Government personnel was fighting the fire on Government land and before the fire came onto Fibreboard land. R. 212, Finding XVI, and R. 214, Finding IV, and R. 235, Amended Finding XVII, in which the court found:

> "Plaintiffs did not show by a preponderance of the evidence that defendant United States failed to use reasonable care in mop up or other fire fighting activities after August 7 . . ."

And R. 237, Amended Conclusion of Law IV, where the court said:

> "Defendant United States was negligent in failing to use reasonable care in fighting the Heckelville fire on August 6 and 7."

The Division opinion also overlooks the fact that during the argument of all of the plaintiffs' motions to amend the findings, the district court specifically lim-

ited his findings of Government negligence to August 6 and 7 and said:

> "THE COURT: I am concerned with whether I have used the right language to express what I found and believe. I am satisfied that the Forest Service in what I call 'the initial fire period,' August 6, 7, did not act as promptly and fully and effectively as reasonable care required."

It is clear from the arguments in all of the appellants' briefs that they understood that the court's finding pertaining to Government negligence was limited to August 6 and 7 while the fire was being fought on Government land and before it went upon Fibreboard's land. Finding XVI quoted on page 5 of the Division opinion again illustrates that the court's finding of negligence was limited to the activities of the Government personnel while fighting fire on the 60-acre Government-owned area where in that finding it is said:

> "Employees of the United States, failed to act as promptly, vigorously and continuously as they were required to do in the exercise of ordinary care *in attacking the Heckelville spot fire and in attempting to confine it to the 60-acre area.*" (Italics ours)

It is submitted that if there is any doubt as to the intention of the district court to limit its findings of negligence of the Government to August 6 and 7 while it was fighting the fire on Government land, the cause should be remanded to the district court to clarify the findings on this point.

III.

Fibreboard had right to rely on Government to fight fire with due care and to take "immediate, vigorous action" to control the fire as required by the terms of the Co-Operative Agreement. This same right of reliance by Fibreboard stemmed from the fact that th Government owned the adjoining lands where the 60-acre fire started and from which the fire spread onto Fibreboard land mid afternoon of August 7, 1951.

Fibreboard had a right to rely on the Government to use due diligence in fighting fire on its own land as an occupier of lands adjacent to Fibreboard land. It had the additional right of reliance because of the terms of the Co-Operative Agreement.

On page 3 of the Division opinion, in referring to the Co-Operative Agreement, it is said that:

> "This agreement, which was relied upon by Rayonier and by others, would be the basis of an affirmative obligation of the United States to use care in the premises if there were no other basis of liability on its part in its capacity as land occupier."

Fibreboard had the same right and a duty to rely on this agreement as did Rayonier and Arnhold. Notwithstanding these facts, Fibreboard is here held for the negligence of the Government which was committed before the fire came upon Fibreboard land. Fibreboard is held through and because of this negligence which is said by the court to have been a cause of the fire getting out of the 60-acre Government tract and going into Fibreboard lands.

The Government assumed full control of these fires shortly after they started on August 6.

One of appellant Arnhold's requested Conclusions of Law, R. 460, Paragraph XIII, reads as follows:

> "The assumption of control and direction of all fire fighting efforts by Mr. Floe and his subordinates at 12:30 p.m. on August 6, 1951, and retention of such control continuously thereafter, thereby causing plaintiffs and additional plaintiffs, *among others,* to rely in this regard, charged the Government with the duty, dischargeable by Mr. Floe and his subordinates, to employ every reasonable skill and effort to control and suppress the fire. This duty supplements and is in addition to the same duty theretofore assumed by the Government's becoming a party to the Cooperative Agreement." (Italics ours)

It will thus be seen that appellants Arnhold urged in the district court that the Government assumed control of the fire on August 6 at 12:30 p.m.; that it retained such control continuously thereafter and that this fact justified plaintiffs "among others" to rely in this regard. Certainly, Fibreboard, as a member of the Co-Operative Agreement and a neighboring landowner to the Government, was one of the "others" entitled to rely on the Government to employ reasonable skill in its efforts to suppress the fire after the Forest Service had assumed complete and exclusive control and direction of all fire suppression activities.

Appellants Arnhold, in their brief at page 52, agreed that Fibreboard could not and should not interfere with Forest Service activities where it is said:

"Argument and the Court's Findings that Fibreboard could not interfere with the Forest Service management of the fire was essentially pointless. *No one suggested it should do so.*" (Italics ours)

IV.

The Division opinion is based on wrong principles in applying the doctrines of proximate cause and burden of proof. The Division opinion is in conflict with Washington law on these points or doctrines.

The Division opinion is decided on wrong principles of law as they apply to the doctrine of proximate cause and burden of proof established by the laws of the State of Washington.

The word "negligence" is used in the Division opinion as encompassing both negligence and proximate cause. Such is not the law in Washington. Washington law requires that plaintiff sustain the burden of proof in showing or proving negligence and the plaintiff must likewise sustain the burden of proof in showing that such negligence proximately caused plaintiff's damage.

Uniform Jury Instructions adopted by the Washington court provide that the plaintiff "has the burden of proving, by a fair preponderance of the evidence, that the defendant was negligent in some one of the particulars claimed, and that such negligence was a proximate cause of the injury and damage complained of." This rule is recognized in appellant Arnhold's brief at page 26 where it is said:

"There are not differing requirements of proof of negligence and proof of proximate cause."

The rule is succinctly stated by the Washington Supreme Court in *Evans v. Yakima Valley Transportation Co., en banc,* 1952, 39 Wn.(2d) 841, 239 P.(2d) 336, as follows:

> "In order to establish a cause of action, plaintiff must prove that the actions of defendant's bus driver constituted negligence towards her, and that his negligent actions were the legal, or proximate, cause of her injury. *Liability does not rest in the negligent act, but upon proof that the act of negligence was the proximate cause of the injury.*" (Italics ours)

In *Wilson v. Northern Pacific R. Co.,* 44 Wn.(2d) 122, 265 P.(2d) 815, the law of Washington, as reflected by this opinion, is accurately summarized in the headnotes as follows:

> "A person seeking relief in damages for injuries sustained must not only prove a negligent act, but must also prove that it was the proximate cause of the injuries; and while proximate cause may be proved by circumstantial evidence, such proof must be upon evidence, not speculation or conjecture . . ."

In *Udhus v. Peglow,* 155 Wash. Dec. 942, 350 P.(2d) 640, decided March 31, 1960, since the briefs in the case at bar were written, the appellant assigned error on a finding similar to the findings made by the district court in the instant case. In the *Udhus* case, the court made the following findings:

> "That plaintiff Edwin Udhus, entered the aforesaid intersection at a rate of speed in excess of 35 miles per hour in violation of R.C.W. 46.28.021;

> that said speed was not a proximate cause of the accident."

In discussing this finding, the Washington Supreme Court said:

> "Appellants assign error to the court's finding that respondent's excessive speed was not a proximate cause of the accident."

The Washington Supreme Court affirmed the trial court because the plaintiff had not sustained the burden of showing that the negligence referred to in the quoted finding was a proximate cause of the accident. This is true even though the plaintiff Udhus had violated a positive statute according to the finding and was thus negligent as a matter of law. Obviously, the purpose of the statute referred to in the finding in limiting speed at the intersection was to avoid accidents. Therefore, it could have been said that it was reasonably foreseeable that an accident would occur if the speed limitation was violated.

The foregoing citations point up the fact that the Division opinion misconstrues the Washington law in connection with the plaintiff's burden of proving proximate cause when on page 6 of that opinion it is said:

> "The burden of proof is certainly not upon the plaintiff to show that, had the defendant not been negligent at the start, the fire would have been contained within any particular space."

The burden of proof was on appellants to show that the negligence of August 6 and 7, found by the district court, proximately caused the fire to escape from the

60-acre tract on Government land and spread into Fibreboard land. It is suggested that the above quoted statement from page 6 of the Division opinion is an inaccurate statement of the rule of burden of proof as applied in the State of Washington.

The Division opinion on page 4 asserts that when the district court found Government personnel to be initially negligent, "we take it he means not negligent in the abstract, . . ." This statement overlooks the fact that the district court definitely stated not only in the findings but during a post-trial argument exactly what he meant. At R. 292, the district court said:

> "I am satisfied that the Forest Service in what I call 'the initial fire period,' August 6, 7, did not act as promptly and fully and effectively as reasonable care required . . . In my judgment, under the evidence and considering the conditions existing at the time, *it is impossible for me or anyone else to say that the fire could have been contained or suppressed even with the ultimate action by the Forest Service during that period.*" (Italics ours)

The district court went on to say on the same page that the fire could not have been controlled, in the absence of any negligence of Government personnel, "under the conditions existing at that time considering the extremely difficult and hazardous conditions with respect of fire in existence at that time." Obviously, the district court believed that the fire could not have been controlled even in the absence of any negligence on the part of Government personnel. Therefore, the negligence found by the district court, whether it be re-

ferred to as negligence "in the abstract" or otherwise, was not proved to be the proximate cause of the fire spreading onto Fibreboard land. Thus, the trial court was forced to conclude that appellants had failed to sustain the burden of proving that the Government's negligence of August 6 and 7 proximately caused the spread of the fire onto Fibreboard lands.

We have taken the liberty of referring to these decisions above cited for the reason that not until the Division opinion was filed had Fibreboard been charged with liability through or by reason of any negligent acts of the Forest Service personnel.

V.

The Division opinion goes behind and beyond the Findings of Fact as to Fibreboard.

On page 2 of the opinion it is said:

> "In the view we take, it is not necessary to go behind the district court's findings of fact."

On page 59 of appellant Arnhold's opening brief, this court is asked to reverse the district court as to the United States and the Railroad "upon the Findings of Fact." It is then suggested that this court should reverse the district court as to Fibreboard "on the preponderance of the evidence and the law of the State of Washington." Obviously, these appellants recognized that the Findings of Fact made in behalf of Fibreboard were not clearly erroneous and therefore requested a reversal as to Fibreboard "on the preponderance of the evidence." No suggestion was ever made by any appellants that Fibreboard should be held responsible

through and by reason of Government personnel negligence of August 6 and 7. The district court exonerated Fibreboard from all of the grounds of negligence charged by the appellants. This was done in the district court's Memorandum Decision and Findings of Fact and Amended Findings of Fact. R. 189 for Memorandum Decision, § 212, Finding XIV, in which the court found:

> "Plaintiffs did not show by a preponderance of the evidence that defendant Fibreboard failed to use ordinary care in any of the particualrs of negligence alleged by plaintiffs."

This identical finding is contained in Amended Finding XV, R. 234.

In view of these findings exonerating Fibreboard from all charges of negligence made against it in the district court, it is respectfully submitted that Fibreboard should have an opportunity to be heard in connection with the manner in which liability is here fastened upon it by the Division opinion.

VI.

The Division opinion, in attaching liability to Fibreboard, applies what this court once referred to as a harsh rule.

In *Rayonier, Inc. v. United States,* 225 F.(2d) 642, this court said:

> "We fail to find a case wherein a landowner was held liable to third parties for failure to fight a fire spreading across his land from the land of another. . . . To hold an intermediate landowner liable for damage to property caused by fire passing over his land, to all parties subsequently damaged

> notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule."

It is clear that the Division opinion does impose the "harsh rule" on Fibreboard. The harsh rule referred to is imposed on a theory not urged by any of the appellants in the court below or in this court.

The harsh rule referred to becomes even more harsh when we are reminded that Fibreboard's conduct and cooperation with the Forest Service from August 6 to September 20 was highly commended and approved by the Forest Service (Tr. 4074-4079); that the fire first escaped from the Government 60-acre tract into an adjoining 1,500-foot strip of sixty-five-year-old timber on Fibreboard land and burned that green timber (Tr. 2012, 3477, 4488); that no one suggested in the trial below that Fibreboard could or should interfere with the Forest Service's management of the fire; see appellant Arnhold's brief page 52; and finally that it is an admitted fact in the pre-trial order "that defendant Fibreboard had paid all fire patrol assessments necessary to qualify it for protection under the Co-Operative Agreement." R. 358-359.

Fibreboard is held liable by the Division opinion because of Forest Service negligence. In view of the fact that this question has never previously been raised, we suggest that this case should be remanded to the district court for additional findings pertaining to this subject matter.

It is further respectfully suggested by Fibreboard

that the case should in any event be remanded to the district court as to Fibreboard to allow the district court to clarify any possible question of whether or not it found any negligence on the part of Forest Service personnel subsequent to August 6th and 7th after the fire spread from the 60-acre area on Government property to Fibreboard land.

If the district court should find, as contended by Fibreboard, that the Government's negligence was committed only while fighting the fire in the Government-owned 60-acre area on August 6th and 7th before the fire spread onto Fibreboard land, the last two paragraphs of the Division opinion could be modified and an affirmance of the district court's judgment as to Fibreboard would follow.

WHEREFORE, Fibreboard respectfully prays that its petition for a rehearing be granted, respectfully suggests that it be granted *en banc,* and that in any event the cause be remanded as to Fibreboard to the district court for clarification of findings as hereinabove suggested and that the judgment of the district court upon further consideration be affirmed as to Fibreboard.

Respectfully submitted,

SKEEL, MCKELVY, HUNKE, EVENSON & UHLMANN
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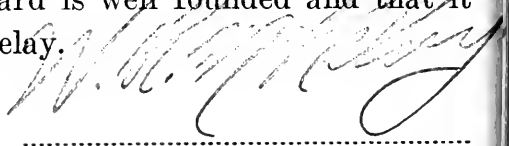
Attorneys for Appellee
Fibreboard Products, Inc.

CERTIFICATE OF COUNSEL

W. R. McKelvy, of counsel for Appellee Fibreboard Products, Inc., a Delaware corporation, hereby certifies that he is and has been at all times since the commencement of the above litigation, familiar with said litigation and has personally participated in all proceedings in behalf of Appellee Fibreboard Products, Inc., and I do hereby certify that in my judgment the accompanying petition for rehearing, including the request to remand to the District Court to clarify Findings pertaining to Fibreboard is well founded and that it is not interposed for delay.



.....

W. R. McKelvy

No. 16367

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR A. ARNHOLD, et al, *Appellants,*

vs.

UNITED STATES OF AMERICA, et al, *Respondents*

APPELLANTS' MEMORANDUM IN RESPONSE TO PETITIONS FOR REHEARING

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FRAYN LETTERPRESS

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APPELLANTS' MEMORANDUM IN RESPONSE TO PETITIONS FOR REHEARING

In response to the order of the Court of January 16, and the several petitions for rehearing, appellants submit the following memorandum:

I. *The prior decisions of this court do not justify any of the petitions for rehearing.*

Throughout its entire petition the Government argues the effect of this court's decision upon the prior appeal (Nos. 14329 and 14331). Thus the petition reviews the complaint (Gov. Pet. 2-3), asserts there is an intra-circuit conflict (Gov. Pet. 6, 10, 13

and 14) and repeatedly argues that some aspect of those decisions is a determination of Washington law binding upon the court here.

Those decisions were, of course, vacated.

The complaint is not even part of this record, having passed "out of the case" (R. 405) upon entry of the pre-trial order.

In seeking and obtaining a writ of certiorari on review of the prior decisions in this case, appellants argued at length that any purported determination of issue of proximate cause was erroneous. It was pointed out in the Supreme Court of the United States that:

> "The issue of proximate cause was not argued before or decided by the District Court. It was neither briefed nor argued before the court below." (App. Br. p. 48, Sup. Ct., No. 47, Oct. Term, 1956).

The Supreme Court thereupon held:

> "The record shows that the trial judge dismissed both complaints in their entirety solely on the basis of the *Dalehite* case. While the Court of Appeals relied on state law to uphold the dismissal of those allegations in the complaints which charged negligence for reasons other than the Forest Service's carelessness in controlling the fire, we cannot say that the court's interpretation of Washington law was wholly free from its erroneous acceptance of the statements in *Dalehite* about public firemen * * * We think it proper to vacate both judgments in their entirety so that the District Court may consider the complaints anew, in their present form or as they may be amended, wholly free to determine their sufficiency . . . " *Rayonier,*

Inc. v. United States, 352 U.S. 315, 320-321 (1957)

Upon remand, the cases proceeded to trial upon the complaints and pre-trial orders which superseded them—neither the District Court nor any party to the cases conceiving that the vacated decision of this court was a correct application of Washington law.

In summary, the Government's petition for rehearing relies almost entirely upon vacated decicions as do portions of the Fibreboard Petition (p. 17).

II. *This court correctly held that "Proximate Cause" is not an arbitrary defense to liability for a negligently caused or guarded fire under Washington law.*

In at least three cases the Washington Supreme Court has affirmed recoveries for a fire loss where the fire crossed lands owned by others. *Prince v. Chehalis Sav. & Loan Ass'n,* 186 Wash. 372, 58 P(2d) 290 (1936), aff'd en banc. 186 Wash. 377, 61 P(2d) 1374, (a fire started in a garage, spread through an adjacent rooming house, then destroyed the plaintiff's home).

Wood & Iverson, Inc. v. Northwest Lumber Co., 138 Wash. 203-204, 244 Pac. 712 (1926) ("The fire traversed some two miles of respondent's logging works, crossed some intervening green timber, and went into appellant's logging works, where the damage was done.") *Conrad v. Cascade Timber Co.,* 166 Wash. 369, 7 P(2d) 19 (1932).

III. *This court's decision properly applied applicable Washington law of Proximate Cause to the Findings of the trial court.*

Washington law holds a person liable for damages which flow in unbroken sequence from negligent conduct where some damages are foreseeable as a consequence of that misconduct even though the loss is greater than might have been anticipated and injures someone entirely unknown to the negligent actor.

Washington has specifically adopted the rule of the *Palsgraf* case that

> "The risk reasonably to be perceived defines the duty to be obeyed."

Frazee v. Western Dairy Products, 182 Wash. 578 586, 47 P(2d) 1037 (en banc 1935);

Kennett v. Yates, 41 Wn(2d) 558, 564, 250 P(2d) 962 (1952).

The trial judge's findings, quoted in this court's opinion, establish beyond question that the Government was negligent because its conduct created a risk of a great conflagration which might burn from Heckelville to the Pacific Ocean. Appellants here claim damages for portions of just such property destroyed in exactly that kind of a conflagration.

A. *The Findings of the court below establish proximate cause and any purported finding to the contrary is only an erroneous conclusion of law.*

Having found initial negligence in controlling the Heckelville fire and damages resulting from the escape of that fire, it necessarily follows that proxi-

mate cause as a matter of fact and law is established.

There was nothing remote or unforeseeable about the result of the Government's negligence. *Guerin v. Thompson,* 53 Wn(2d) 515, 335 P(2d) 36 (1959).[1]

IV. *This court correctly held that PAW and Fibreboard had a non-delegable duty to control the fire.*

In *Babcock v. Seattle School District No.* 1, 168 Wash. 557, 560, 12 P(2d) 752 (1932) the court held:

> "Fire is a dangerous agency and ever since the judgment rendered by Lord Cockburn in the case of *Bower v. Peate,* L.R. 1 Q.B.D. 321, the doctrine has prevailed that one who contracts for work from which, in the natural course of events, consequences injurious to his neighbor may reasonably be anticipated, cannot escape liability in case of damage, unless reasonable means have been adopted to avoid the injury."

Entirely aside from its obligations as an occupant of forest lands, the PAW was obligated to fight fires occurring on its right of way by virtue of its license from the Government and terms of its purchase agreement. It would be anomolous indeed to hold that the PAW was relieved of any duty to afford fire protection to its right of way because the State of Washington had entered into the cooperative fire agreement with the Government when the PAW expressly agreed to furnish that protection by direct agreements with the United States. In short, PAW is necessarily liable for (1) failing to perform its primary duty and (2) the failure of the United States to do so.

---

[1]The issue was negligence of the plaintiff which the court held was a proximate cause of the accident as a matter of law.

V. *This court did not hold Fibreboard liable upon any new theory.*

Fibreboard at the trial and in the argument here and in its petition again urges that it had a right to rely upon the Government and had no right to take action which might interfere with the Government's activities.

Appellants argued and proved that Fibreboard had knowledge of the Heckelville fire prior to 1:00 p.m. on August 6, 1951 but released its men, although their employees could have walked to the fire in about half an hour. (Tr. 358, 545) and four men could have extinguished the fire by that time (Tr. 537).

On August 7, 1951 the fire escaped through and into Fibreboard slash (Tr. 4202, 2011-2012). At no time did Fibreboard take any action of its own to suppress or control the fire.

Considering the known danger, Fibreboard was required to know of the Government's failures and to remedy them. Even assuming that the Government had the primary duty and Fibreboard's duty was secondary only, it had an obligation to determine if the Government was performing its duty properly and to take proper measures itself if the Government failed or refused to do so. *Mills v. Orcas Power & Light Co., et al.,* 156 Wash. Dec. 808, 355 P(2d) 781 (1960).

The court's findings of negligence "during the initial period, August 6-10", (R. 189) in his memorandum opinion were "incorporated in these findings of fact to the same effect as though set forth in full herein." (R. 206) In addition, of course, the fire

burned onto Fibreboard lands on August 7, 1951 on which date even Fibreboard concedes the Government was found to be negligent. Fibreboard appears to urge that the fire did not reach its lands until after August 7, which is clearly contrary to the findings of fact. (Finding X, R. 210).

CONCLUSION

This court properly found the law applicable to the findings of fact made by the court below.

The petitions for rehearing should be denied.

Respectfully submitted,

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No. 16368

United States Court of Appeals
For the Ninth Circuit

RAYONIER INCORPORATED, a corporation, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

OPENING BRIEF OF APPELLANT RAYONIER INCORPORATED

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OPENING BRIEF OF APPELLANT RAYONIER INCORPORATED

JURISDICTION

The district court had jurisdiction over the subject matter of and the parties to this action under 28 U.S.C. §§ 1331, 1346(b) and 2671-80, commonly known as the Federal Tort Claims Act (R. 3, 171; Conc. II, R. 236; Find. II, R. 243). This court has jurisdiction to review the district court's judgment (R. 215-17) under 28 U.S.C. §§ 1291 and 1294(1).

STATEMENT OF THE CASE

Foreword

Rayonier seeks recovery from the United States of damages stipulated to be $895,000 for loss of timber and other property, caused by Forest Service negligence in failing to prevent, control and extinguish a forest fire in August and September, 1951, on the Olympic Peninsula, Washington (R. 168-69, 173).

This case has already been before this Court on a challenge to the sufficiency of the complaint. *Rayonier Incorporated v. United States,* 225 F.2d 642 (9th Cir. 1955). The United States Supreme Court granted certiorari and *vacated in their entirety* the judgments of both this court and the district court. *Rayonier Incorporated v. United States,* 352 U.S. 315 (1957).

Appendixes "D" and "E" are maps derived from Exs. 26 (Ex. 8 thereto), 61, 62, 80, 108, 111, 112, and 134, which are intended to assist in orienting the court to the Soleduck Valley of Washington's Olympic Peninsula where this fire occurred.

The following statement of facts is adopted partially from the government's hypothetical question (Ex. 177). In its hypothetical question the government adopted, with minor modifications, the facts set forth in Rayonier's multigraphed hypothetical question (Tr. 3358-73, 3575-76, 3727, 3742-43). Therefore, to the extent that the facts set forth in Ex. 177 are identical with those set forth in Rayonier's hypothetical question, they are facts agreed to on the record. References herein to the hypothetical question (Ex. 177) are designated "HQ" and the page of Ex. 177 is stated, e.g., "HQ 2."

The Time, Place and Conditions

The Soleduck River flows from east to west. U. S. Highway No. 101 ("Olympic Highway") runs east and west through the Soleduck Valley. There is a point on the highway in Section 30, T-30-N, R-10-WWM ("Section 30") at which there are a few small frame build-

ings known as Heckelville.[1] At Heckelville the Soleduck winds within 300 feet south of the Olympic Highway (HQ 1).

Across the river from Heckelville were the tracks of the logging railroad Port Angeles & Western Railroad Co. (PAW) which ran the 70 miles between Port Angeles and Forks. Forks is 27 miles west and south of Heckelville (HQ 5).

The area south of Heckelville, on which the tracks were located, is about 1000 feet above sea level and fairly flat. Part of this is called the 60-acre area. Further south forested hills and mountains rise to varying elevations up to 3000 feet or more, with numerous ridges, valleys, draws and canyons running in various directions (Exs. 111, 112, 128, 129, 132, 132-A; HQ 2, 6).

Camp Creek flows northwesterly into the Soleduck just west of the 60-acre area. The PAW crossed Camp Creek on a bridge in the center of Section 30 near the westerly end of the flat 60-acre area.[2] The PAW maintained a railroad water tower called "Flight" a little less than a mile west of the bridge.

In 1951 Fibreboard Products, Inc. ("Fibreboard") operated a logging camp, called "Camp One," a mile or so east of Heckelville. The PAW main line passed

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[1] Shown on aerial photos, Exs. 127-132-A, and on maps, Exs. 108, 134. In Exs. 128-132-A, Heckelville appears above "Scale" in bottom margin of each photo.

[2] Camp Creek shows clearly on Exs. 128, 129, 130, 131, 132 and 132-A. In Ex. 132-A the confluence of Camp Creek and the Soleduck is near right margin where red legend "1938" appears.

through Camp One and there was a long railroad siding there (HQ 2).[3] Fibreboard employed about 50 loggers at Camp One. Except for four or five men who lived at Camp One, these Fibreboard loggers lived at scattered places elsewhere, mostly in or near Port Angeles. Several lived within 7 or 8 miles of the camp (Tr. VI, 1993-97, 2005; VII, 2042, 61, 64, 2282-87; Ex. 14, Fibreboard Ex. No. 6; HQ 2, 3).

During hoot owl operations the Fibreboard men would commence to leave the woods in several crew trucks at about 12:30 p.m. daily. The driving time from the woods to Camp One was about 20 minutes. Upon arrival, the men would change from their logging boots at the bunk house and then most of them would board Fibreboard trucks bound for Port Angeles and intermediate points. On August 6, 1951, this crew commenced to roll into Camp One at about 12:50 p.m. (Tr. VI, 1993-97; VII, 2043, 2061-64, 2288-89; HQ 9).

There were also 12 to 15 logging truck drivers engaged in this operation. Usually there were several of these trucks at Camp One between 12 and 1 p.m., waiting to have their loads scaled (Tr. VII 2061-64, 2105-06, 2285-89; HQ 9).

The U. S. Forest Service's Snider Ranger Station ("Snider") was located on the Olympic Highway about four miles west of Heckelville. In 1951 Forest Service District Ranger Floe was the Forest Service of-

[3] Camp One appears in the lower left corner of Ex. 132-A. In Ex. 132 an arrow marked "Phone" points to Camp One. Sometimes Camp One is referred to in the record as Soleduck, the PAW name for its station there.

ficer in charge of the Soleduck District.[4] He had his home and office at Snider. Snider was the fire control headquarters for the Soleduck District and Floe was the chief fire control officer (Tr. II, 372-83, 390-94, 397-400, 521; III, 803; Exs. 61, 134).

Floe's subordinates stationed at Snider included District Assistant Evans, the fire control officer, whose duties included training and supervision of the fire suppression crew and lookouts; two timber sales officers, and one man designated as fire suppression crew foreman, all of whom were experienced fire fighters; about nine specially trained fire fighting personnel (fire suppression crew) with necessary equipment; and two lookouts, one of whom was stationed at North Point. A large stock of hand tools for fire fighting and vehicles to carry tools, personnel and water were maintained at Snider. Mrs. Floe, the District Ranger's wife, who lived at Snider, was employed by the Forest Service there and sometimes made and received telephone and radio calls (R. 8, 14, 15; Find. VII, R. 231; Tr. II, 394, 519-21, 531-34, 554-55, 700-02, 709, 713-14, 718-20; III, 986-88; Ex. 14).

Radios in the Snider Station, North Point, Snider trucks and cars and walkie-talkie radios of the Forest Service were all on the same wave length, exclusive to the Forest Service, and each could send and receive messages to and from each of the others (R. 176; Tr. II, 531-32, 720, 727-28).

There were kept at Snider a forest fuels type map re-

[4] The Soleduck District encompasses all the lands material herein. Its boundaries are outlined on Ex. 80 (Tr. 372-78).

lating to the Soleduck District and a slash hazard map showing the logging done each year and the burned and unburned slash areas left following such logging. Also, at Snider were a number of fire weather instruments to measure relative humidity, wind velocity and the moisture content and burning potential of forest fuels. Fire weather data and fire weather radio forecasts were received and recorded by the personnel at Snider (Exs. 12, 13, 14, 27, 37, 38, 44, 77, 80, 81, 86, 104, 107, 115, 116, 168, 176; Find. VII, R. 231; HQ 3, 4, 8).

The North Point Lookout ("North Point") was over 3000 feet above sea level on top of a ridge two miles northwest of Heckelville from which could be seen Camp One; the PAW tracks; the area south and west of Heckelville, including the 60-acre area (Exs. 112, 132-A); the westerly half of what hereafter is called the "1600-acre area"; and the area immediately west of the 1600-acre area. The lookout building was equipped with an instrument by which the lookout could locate accurately on a map (maximum error would not exceed 200 to 300 feet) "smokes" observed by him. North Point and Snider could communicate by two-way voice radio equipment on a radio frequency exclusive to the Forest Service (R. 175; Tr. II, 377, 522-27; III, 718-21).

Rayonier had a logging camp at Sappho on the Olympic Highway fourteen miles west of Heckelville. Near Sappho the PAW and Rayonier's private logging railroad were connected. Rayonier's locomotive was based at Sappho (HQ 3). About 140 Rayonier employees lived in the bunk houses at Sappho and about 12 or 15 other

Rayonier employees lived in their own homes at Sappho. On August 6 the Rayonier crews started rolling into Sappho by rail and by truck about 1 o'clock. By 2 p.m. most if not all of the 140 Rayonier employees had returned to camp (Tr. VI, 1878-90; Ex. 14; HQ 3).

The State of Washington operated a forestry office at Tyee on the Olympic Highway eighteen miles west of Heckelville (HQ 8) where it maintained a fire suppression crew of 7 or 8 men and fire fighting tools and equipment (Tr. III, 750-51; V, 1670-75; HQ 3, 8; Ex. 14).

Throughout the 1600-acre area and outside of it there were inter-connected logging roads which provided usable and safe access to all parts of that area[5] (Tr. III, 794; HQ 6, 7).

The Soleduck and Camp Creek had more than enough water to supply all fire fighting requirements in the summer of 1951. Water could be procured from both rivers through pumps and hoses and through tank trucks and pack cans by which water could be hauled or carried to all parts of the area (Tr. II, 593; V 1480).

Floe knew that easterly winds in the Soleduck Valley are usually hot, dry winds; that August and September winds with velocity up to 10 mph are usual in the Soleduck Valley; that 15 mph winds are not unusual; that 20 mph winds are more unusual but would be expectable; that 25 mph winds were even more unusual but could occur; and that 30 mph winds would ordinarily not be expected to happen but they could happen. Winds at higher elevations are of even greater velocity (R. 20;

[5] Many of these roads are shown on Exs. 61, 112, 128, 129, 132.

Find. I, R. 228; Tr. II, 715-17; Exs. 12, 13, p. III-1-3; 150, p. 23, et seq.; HQ 7, 7(a)).

The government-owned 60-acre area comprises a part of the flat area through which ran the PAW tracks.[6] This flat area in Section 30 previously had been logged and burned over in 1938. In 1951 scattered trees, 10 or 12 years old, were growing there. Among these small trees and in the more open areas, there were dry grasses, blackberry vines, Bracken fern, stumps and old, rotten logs remaining from the original logging. There was a tall snag standing in about the middle of that flat. Near the easterly end of the flat there was sapling second-growth timber in which there were fire hazardous snags and considerable "blowdown" (R. 10-12, 174-5, 234; Tr. II, 447-54, 456-460, 475-78; III, 1013; V, 1459-61; Exs. 111, 131, 162; HQ 6).

South of and uphill from the flat 60-acre area is the so-called 1600-acre area. It is a rugged, broken, mountainous area. Its westerly part had been logged in the late 1940's and the easterly part prior to that time. In 1951 those areas contained fairly heavy unburned logging slash, marked by red X's on Ex. 112 (Tr. II, 475-501, 709-711).

The other slash in the 1600-acre area had been burned. There were several old logging landings in the 1600-acre area where in 1951 there were concentrations of bark and other burnable logging debris (R. 177-78; Tr. II, 475-501, 709-711; Exs. 112, 113, 114, 148; HQ 7).

All sides of the 1600-acre tract abutted areas which on August 6, 1951, contained either fire hazardous forest

[6] The topography of the area south of Heckelville through which the PAW runs is shown on Exs. 111, 112, 128, 129, 132 and 132-A.

fuels or valuable standing timber. There were stands of mature green timber immediately south, east and west of the 1600-acre area. Also on the west, as indicated by red X's on Ex. 112, there were 120 acres which had been logged in 1946 and 1947 and upon which there was heavy logging slash. In the standing timber southwest of this heavy slash stood a number of fire hazardous snags.[7] Abutting the northerly side there was a stand of young second-growth timber (R. 174; Tr. II, 709-11; HQ 7).

On August 6, 1951, due to fire hazardous weather conditions, Soleduck District loggers were required by closure order of the Forest Service to operate on the "hoot owl" shift, starting at daylight (4 a.m. at that time of the year in the Soleduck District) and leaving the woods about 12:30 p.m. when the relative humidity drops so low that logging becomes fire hazardous (Ex. 150, p. 18; HQ 9; Tr. II, 721; R. 18).

The spring and summer of 1951 were among the driest on record. Little rain had fallen in the Soleduck District for several months prior to August 6, 1951. There had been a gradual increase in the fire hazard, and burning conditions in August, 1951, were severe (R. 175; Find. VIII, R. 231; Tr. II, 502-508).

A fire suppression plan for the Soleduck Forest Service Protective Area previously had been approved by the Supervisor of the Olympic National Forest to be followed and employed by Floe and his subordinates. The plan was in effect at all times herein mentioned.

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[7] The approximate snag area being as shown by the red crosshatchings on the aerial photograph, Ex. 129.

The plan included, among other things, a list of privately employed men and privately owned equipment available for fire fighting at all times. The fire suppression plan contemplated that Floe and his subordinates would call upon and use all men and equipment necessary to suppress and extinguish all fires within the Forest Service Protective Area as promptly as possible. As the forest officer in charge, it was one of Floe's duties to call upon and use such men and equipment (Find. V, R. 230; Find. VII, R. 231; R. 12; Tr. II, 373-382, 401-02; Ex. 14).

In this general vicinity the forest industries provided the primary occupation and means of livelihood of the residents. Protection and preservation of the forest was a matter of first concern, both to the residents and to timber mill owners and operators. Consequently, most men willingly and voluntarily would respond to calls for assistance in fighting fires and owners of equipment willingly and voluntarily would furnish their equipment when called for to fight fires (Find. VI, R. 231; Tr. 708).

Foreseeable Consequences of Negligence

The district court found the government negligent on August 6 and 7. He correctly stated the law:

> "All damages of a kind reasonably foreseeable as a consequence of failure to exercise reasonable care in the restraint and suppression of the fire may be recovered against the negligent party." (R. 179-80)

Finding IX, R. 232, reads:

> "On August 6, 1951, at and prior to the time

when the Heckelville spot fire occurred, District Ranger Floe knew or should have known that a fire in that area which was not extinguished might burn continuously and progressively and might burn property for many miles in any direction, including westerly and southerly to the Pacific Ocean."

Because the rangers were fully aware of all of the facts and physical and weather conditions above described and of the fire-fighting rules discussed below, the harm which appellant suffered was clearly foreseeable and within the scope of the risk which their negligence created.

The Basis for the Government's Legal Duties

1. *The Government Owned the Land on Which the Fire Started and from Which It Spread Out of Control*

The government owned all of Section 30 and all of the land in the so-called 60-acre area, including the PAW right of way therein.[8] Some of the land in the so-called 1600-acre area was owned by the government (Find. IV, R. 230).

2. *The Government Assumed Duties Under the Cooperative Agreement*

At all times pertinent to this litigation the Forest Service was responsible for the fire protection of all lands material herein by virtue of a cooperative agreement executed under 16 U.S.C. § 572 and RCW 76.04-.400 between the United States and the State of Wash-

[8] The PAW had a contract vendee's interest in the right of way. However, in Washington, a landowner cannot absolve himself from liability to third parties for damages caused by negligent forest fire abatement, by contracting to sell the land to another (R. 193).

ington. The cooperative agreement required the Forest Service to protect these lands from fire and to take "immediate vigorous action" to control all fire occurring within the protected area. Rayonier knew this and reasonably relied on the government for this protection (R. 173-74; Find. V, R. 230-31; Exs. 24, 80).

3. *The Government Had Duties Imposed on It by RCW 76.04.450*

All of the government-owned lands on which the Heckelville fire originated and all of the lands to which it subsequently spread are Olympic Peninsula forest lands which Washington's legislature, prior to 1951, specially identified as fire hazardous and as requiring special protection. Floe and his subordinates were duty bound to avoid "any act which shall expose any of the forests or timber upon such lands to the hazards of fire" (RCW 76.04.450; Find. IV, R. 230).

4. *All Government Acts and Omissions Were Nondiscretionary*

All duties of the government as landowner, under the cooperative agreement and under RCW 76.04.450, were exercised at the local level by Floe and his subordinates. The acts and omissions of the government employees—found by the district court to have been negligent—were at the operational level and were not in the exercise of any discretionary function, as that term is used in the Federal Tort Claims Act (R. 195; Find. VII, R. 231; Find. XIII, XVI, R. 234-35; R. 239-40).

Fire Chronology

At all times pertinent to this case District Ranger Floe and District Assistant Evans knew all of the things above recounted. They had been stationed at Snider for many years. They had seen and observed the conditions in their area, knew the people in the area, knew the nature and extent of the operations of the various timber companies and of their working schedules, and had, themselves, worked directly in the preparation and compilation of the Fire Suppression Plan, designed for the express purpose of enabling them to get all necessary men and equipment to the scene of any fire in the shortest possible time. They had the most modern means of communication, including radio and telephone, and they had the most modern means of transportation and knew that it was available to them to fight fires (R. 8-10, 176; Find. VII, R. 231; Tr. II 372, 382-83, 426, 542, 600; III 985-88; Exs. 13, 14, 26, 28, 45, 46, 47 and 48; HQ 3, 4, 8).

What those Forest Service Rangers did or failed to do on August 6 and 7 must be viewed in the light of their knowledge and in the light of the facts. Their conduct must also be viewed in the light of the primary principle, repeatedly emphasized in the Forest Service Manual, Fire Control Handbook, and other texts, that the first and most important thing to do in fighting a fire in forest areas is to get to the scene of the fire as quickly as possible with all of the men and equipment necessary to put the fire *out* (R. 238-39; Exs. 12, 13, 150, 176).

Logistics, the matter of getting adequate men and supplies to the right place at the right time, is the function in which the Forest Service Rangers fell down during the first few hours of the fire August 6. Logistics, plus improper and inadequate utilization of men and equipment are the areas in which the Forest Service Rangers were deficient from mid-afternoon August 6 to early afternoon August 7.

This is what happened, and this is why the District Judge found the Forest Service negligent (R. 239; Find. XVI, R. 234-35; Ex. 14):

August 6, 1951, 11:15 A.M.

At 11:15 a.m. a PAW locomotive, eastbound with a trainload of logs, stopped at the Flight water tower to take on water and to allow the train crew to eat lunch. Flight is a short distance west of the point where the Heckelville fire was later started. Prior to reaching Flight the locomotive had started fires along the right of way. One of those fires was discovered under the standing train, and it was extinguished promptly by the train crew. Less than a mile back from there the locomotive had started another fire called "the Section 35 fire." Its existence was not then known to the train crew and was not reported to the District Ranger by the North Point lookout until 12:30 p.m. after it had been burning for at least an hour and 15 minutes. It was to the Section 35 fire that District Assistant Evans and his crew were first dispatched, as related below (R. 175-76; Find. X, R. 232; Tr. I 62, 303-07, 342-45).

12 O'clock Noon

The PAW train left Flight at noon and proceeded eastward to Fibreboard Camp One, where it stopped. On that journey the PAW locomotive threw sparks which started the fire which ultimately damaged appellant's property. That fire started on the PAW right of way in Section 30 due south of Heckelville and is called "the Heckelville spot fire." Thus, we know that the Heckelville spot fire was started about an hour after the Section 35 fire. The Heckelville fire was not discovered until 1 p.m. when the North Point lookout reported it by radio to District Ranger Floe at Snider, as related below (R. 16, 175-76; Find. X, R. 232; Tr. I 303-07, 342-45; Ex. 47).

The PAW train stopped at Camp One, where there was a telephone. The railroad crew had observed smoke to the west and reported that fact to its Port Angeles office and to Snider Ranger Station. The smoke observed probably was the Section 35 fire because it had then been burning at least an hour. The PAW crew had intended to return to the smoke with the locomotive to fight the fire with water from its tender, but found it was unable to reverse the locomotive because of a broken equalizer bar. This fact, as well as the smoke, was reported to the PAW Manager at Port Angeles, and that Manager then dispatched a railroad repair crew from Port Angeles to Camp One. The repair crew did not arrive until about 3 p.m. It should be noted that one of the PAW train crew remained stationed at the Camp One telephone continuously during the afternoon. Telephone messages from the Snider

Ranger Station and elsewhere could have been made to him or relayed to or through him at any time, and he could have conveyed such messages to the Fibreboard personnel at that same place (R. 16, 175-76, 232; Tr. I, 70-77, 161, 307-16, 344-52; Tr. II, 528; Exs. 47, 132).

12:30 P.M.

We go back now to the Snider Ranger Station at 12:30, when District Assistant Evans received by radio from the North Point lookout notice of the Section 35 fire. Ranger Floe was present and knew of the situation. Evans promptly called out his entire fire suppression crew then available at Snider (five men), and left with them for the Section 35 fire in a panel truck. They were equipped with hand tools, back-pack cans, a portable two-way voice radio, and a nonportable two-way voice radio installed in the truck. They drove to the scene of the Section 35 fire, approaching it from the west by way of a road which paralleled and was close to the PAW right of way. Before reaching the Section 35 fire they came upon a small spot fire about two feet in diameter between the tracks of the PAW right of way several hundred feet west of the Section 35 fire. It was so small that Evans knew it was not the smoke reported by the North Point lookout, so he left one man at that spot fire and proceeded to the Section 35 fire. He arrived there at 12:45 p.m., 15 minutes after the fire was reported and at least an hour and one-half after the fire started. The fire was then burning a length of about 200 feet on and to the north of the tracks

to a width of 50 to 100 feet. The five men then attacked that fire and soon had it under control. Upon his arrival at the Section 35 fire, Evans radioed Floe at Snider and told him of the fire's size and characteristics. Floe stated that he would try to get the PAW locomotive to return to that scene to help. It never got there because it had broken down. Nevertheless, this fire, 200 feet long and 50 to 100 feet wide, was controlled by five men (R. 16, 175-76; Find. IX, R. 232; Tr. II, 525-32; III, 988-1004; Exs. 47, 61).

Progress of the Heckelville Fire, 1 P.M.

When the North Point lookout reported the Heckelville fire by radio to Floe at 1 p.m., Floe had no doubt about its location. He also knew that if that fire were left unattended, it might progress to a major forest fire that could burn everything within a radius of 20 miles or more. He also then knew where his own Snider Station men were deployed. He knew that the Fibreboard logging crew and log truck drivers were rolling into the Fibreboard camp and would soon be on their way home. He knew that the Washington State Forestry Department fire suppression crew located at Tyee, 18 miles from Heckelville, was available with equipment. He knew that the PAW train had caused a series of spot fires. He knew that the Rayonier logging camp at Sappho, 14 miles from Heckelville, had over 140 men who were then rolling in from the woods, and that Rayonier had tremendous quantities of fire-fighting equipment and a number of crew trucks, as well as a locomotive with hoses and water. Unfortu-

nately for the timber owners, including the United States, and for the residents of Forks, Floe also knew that the Heckelville fire and the other fires along the right of way had been started by the PAW train and that, therefore, the PAW should be held responsible for fire suppression costs. What followed, and his neglect, can be explained only by Floe's wishful efforts to get the PAW to assume the financial responsibility for the cost of men and equipment which Floe knew would be needed to suppress the fires (R. 16, 17, 176; Find. VII, R. 231; Find. V, R. 232; Find. X, R. 232-33; Tr. II, 465, 519, 530-32, 543-45, 556-65, 583, 595, 600-04, 697-99, 704-05, 712, 721-23; Tr. III, 736-37, 739-41, 757-58, 767, 779, 832, 1005; Ex. 47).

By 1 o'clock, when Floe was advised of the Heckelville fire, he already knew that Evans and the Snider crew were busy on the Section 35 fire and might or might not be reachable by radio, depending upon their proximity to their panel truck, and on whether a walkie-talkie radio was at someone's side with the receiving switch turned on. Before 1:30 he knew that the PAW locomotive had broken down at Camp One and could not get to the fire. Long before that he could have learned from the North Point lookout that the locomotive was still at Camp One. He therefore knew that immediate help for the Heckelville fire would have to come from other sources (R. 16, 176; Find. X, R. 232; Tr. II, 547; Tr. III, 746-50, 1010-11; Ex. 47).

In spite of all this, Floe did not do one single thing concerning the Heckelville fire until 1:30 p.m., at which time he contacted Evans by radio at the Section 35 fire.

In the meantime he had relied exclusively on the hope that the PAW broken-down locomotive would get repaired and returned to the Heckelville fire. By this time the Heckelville fire had been burning for about an hour and a half (R. 16, 176; Find. X, R. 232; Ex. 47).

1:30 P.M.

Floe knew that Evans and his crew were about two miles away from the Heckelville fire and that there was no access between the Section 35 fire and the Heckelville fire except along the railroad track, or by return along the Olympic Highway past the Snider Station and on to Heckelville. From Heckelville men could either ford the river and walk several hundred yards to the scene of the fire, or they could drive on to Fibreboard Camp One and hike a mile down the tracks, or they could drive through Camp One on a logging road which would take them to a point several hundred yards southeast of the fire. Evans also knew this. Time, men and equipment were still matters of urgency (R. 17, 176; Tr. II, 552; Tr. III, 1002-12; Exs. 47, 61).

At this point Evans left the Section 35 fire to reconnoiter by driving farther down the road to a vantage point where he could see the smoke but not the fire at Heckelville. He then returned to the Section 35 fire and radioed Floe that he was taking three of his crew and would drive to Heckelville via Snider and that he planned to wade the Soleduck and walk to the Heckelville fire. *By this time it was 1:45 p.m. Floe had done nothing further in the meantime and did nothing fur-*

ther until 2:05 p.m. (R. 17, 176; Tr. II, 549, 552-53; Tr. III, 736, 757, 766, 1002-12; Exs. 40, 47, 61, 130).

2:00 P.M.

In the meantime, by 2 o'clock the PAW Manager had asked Rayonier to send the Rayonier locomotive from Sappho to the Heckelville fire, and Rayonier then telephoned Floe that it would do so and that the Rayonier locomotive would arrive at the Heckelville fire about 3 p.m. PAW also notified Floe at 2 p.m. that it was sending another locomotive and a repair crew from Port Angeles, which would arrive at Camp One about 3:30 p.m. (Tr. II, 757, *et seq.;* HQ 14).

At 2:05 p.m. the North Point lookout again radioed Floe that the Heckelville fire was going strong. There had been no communication between North Point and Snider between 1 p.m. and 2:05 p.m., although Floe, had he been interested, could have had progress reports both on the fire and on the PAW locomotive for the asking. Floe's first affirmative action to get outside help through anyone but the PAW was at 2:10 p.m.—two hours and 10 minutes after the fire started, and an hour and 10 minutes after he first knew of the fire. At that time he telephoned the state fire station at Tyee, but even then, all he did was to request that the state fire crew be placed on stand-by, which means that the state office should merely notify its crew that it might be called on for help. This is a far cry from asking help, although Floe then knew that the fire was and would continue to be unattended for some time to come (R.

176; Find. X, R. 232; Tr. II, 472-73, 533, 536, 561-67; III, 746-48; HQ 14).

2:30 P.M.

Evans and his three men arrived at the Heckelville fire at 2:30 p.m. They had with them only their hand tools, two back-pack cans and a walkie-talkie radio. When they got there, they found that the fire was burning between the tracks and on the north side of the tracks to a depth of about 100 feet and a length in an east-west direction of about 300 feet. There were also two spot fires, both on the south side of the tracks, which fires were 25 to 50 feet in diameter and about 100 feet apart. The wind was from the northwest at about 8 to 10 mph, with occasional gusts of greater velocity. Evans promptly called Floe by radio and notified him of the size of the fire. He did not report about the wind and did not request additional men and equipment. Evans testified that he could have controlled the Heckelville fire if he had had 10 men with him at 2:30 p.m., but he had just himself and three others and did not ask for more help. This, in spite of the fact that Floe could have had 100 men with equipment long before that hour, had he paid attention to business at 1 o'clock, when the fire was first reported (R. 17, 176-77; Find. X, R. 232-33; Tr. II, 537, 608-09; III, 768, 1009-16, 1024-28, 1038, 1045; IV, 1063, 1122, 1260-61; Ex. 13, p. III-1-1).

At 2:30 Floe called the PAW's President to ask him to request Fibreboard to order a Fibreboard bulldozer and crew to work on the Heckelville fire. He was still

concerned about getting the PAW to foot the bill. He also then called Rayonier's Sappho camp to request that Rayonier men with tools be sent to the fire. Finally, at 2:35 p.m. Floe telephoned Tyee and requested that the state fire crew of seven men with hand tools go to the Heckelville fire. All this time Floe knew that it would take from half an hour to an hour or more to get men to the Heckelville fire. He knew that the size of a fire increases in geometric proportion and that the longer he waited the larger the fire would be (R. 177; Find. X, R. 233; Tr. II, 559-60, 564-67; III, 736-37; Exs. 45, 47; HQ 14(a), 15).

3 P.M.

Evans stayed with his men at the Heckelville fire for half an hour and then left. Why he left, or why Floe permitted him to leave, we cannot explain. Evans had with him a walkie-talkie radio with which he could communicate freely with Floe, and Floe had radios and telephones at his hand with which he could communicate to all sources of help. Nevertheless, at 3 p.m. Evans radioed Floe that he and his three men were unable to control the Heckelville fire and that it was spreading and spotting ahead of them. He told Floe that he proposed to walk the PAW tracks to Camp One, a distance of more than a mile. He got there at 3:30 p.m., having stopped en route to stamp out two more small spot fires between the tracks. Just before reaching Camp One, Evans met a PAW crew of seven men with firefighting tools walking westerly on the tracks. He ordered one of them to check on the two

small fires Evans had just stamped out, and ordered the other six to accompany him to Camp One to await automobile transportation to a point on a logging road a few hundred yards southeast of the Heckelville fire (R. 17, 177; Find. X, R. 233; Tr. III, 1012, 1029, 1035-37, 1047; Exs. 61, 112, 131, 132-A).

In his memorandum decision, after recounting in general terms the conditions that existed on August 6, and that ordinary care under those circumstances "requires urgent speed, vigorous attack and great thoroughness in reaching and putting out a fire" in the forest areas, the district judge stated that "the Heckelville spot fire was not attacked as promptly, vigorously and continuously as ordinary care required * * * " (See R. 238-9).

Finding XVI, R. 234-5, is an explicit finding of negligence.

The district judge also agreed, R. 283-84, that:

> " * * * the [Heckelville] fire was operating as a result of the negligence in a larger area than it would have been had there been no negligence. * * * by reason of that fact this fire had more areas in which it could break over the lines on the afternoon of August 7 and get into the 1600-acre area."

3 P.M. to Nightfall

Shortly after Evans left the Heckelville fire at 3 o'clock, more aid started arriving, but he was not there to organize it. The Rayonier locomotive and tank car from Sappho had to stop just outside the westerly end of the fire. It had three or four men plus two Forest

Service men picked up as the locomotive passed by the Section 35 fire. The Rayonier train crew pumped water on the westerly edge of the fire through a 200-300-foot hose (R. 177; Find. X, R. 233; Tr. II, 558-60; III, 1052; IV, 1372-76; V, 1442-46, 1640-52; VI, 1832-34, 1847-50; HQ 19-20).

By 4 p.m. the state fire crew of seven or eight men and six PAW section men, all with hand tools, had commenced work at the head of the fire, and two additional Rayonier crews totaling 25 to 30 men had arrived with hand tools, and part of the latter worked on the northerly fire line until dark (R. 177; Find. X, R. 233; Tr. II, 567-68; III, 1049-59; V, 1455-58; VI, 1798 *et seq.*, 1822-34, 1847 *et seq.*; HQ 19-21).

By 5 p.m. two Fibreboard bulldozers, a PAW locomotive, four Rayonier hand pumps and perhaps 15 additional men had arrived at the scene. Two portable pumps were placed in Camp Creek and hoses were run up over the Camp Creek Ridge to the south perimeter of the fire (R. 177; Find. X, R. 233; Tr. II, 565; III, 1051; VI, 1832-34; HQ 19-21).

Floe did not go to the fire until after 4 p.m., but even then he did not undertake to organize a fire-fighting plan. Crews were building a hand trail on the slope west of and in front of the sapling timber toward the easterly end of the Camp Creek Ridge, and a bulldozer was making a trail from the logging road toward the easterly end of Camp Creek Ridge. There was no appreciable fire fighting conducted after 5 p.m., although the Rayonier locomotive crew continued to pump water

on the fire at the westerly end until 6 or 7 p.m. (R. 177; Find. X, R. 233; Tr. I, 275; II, 574-77, 579-80, 587-88, 591-92, 594; III, 1051; IV, 1056, 1183; V, 1651-52; VI, 1832-34; Exs. 111, 131; HQ 19-21).

When the Forest Service ordered the men off the job in late afternoon August 6, the fire had burned an area of about 60 acres. Humidity had risen materially and the wind was quieted. The fire was still on the flat but had reached about to the toe of the slope of Camp Creek Ridge (R. 177; Tr. I, 131-32, 283-84; II, 579; IV, 1064; VI, 1184; Exs. 39, 40, 41, 43, 111, 131).

The Night of August 6-7

As noted, the only persons left at the fire after dark were a few men tending the two hoses on the ridge near the south side of the fire, and a couple of men the PAW had stationed to guard the bridge over Camp Creek at the west end of the fire. That night absolutely nothing else was done on the fire and no fire trails were built. There was a conference of Forest Service men late that evening, at which a plan was drafted for fire fighting the next day, and arrangements were made to have additional tractors and men on the fire August 7 (R. 177; Tr. I, 131-32, 231-32, 271-73, 281-84; II, 594 *et seq.;* IV, 1065; VI, 1832-34).

The plaintiffs' experts, men of wide and responsible experience in fire fighting over many years, all insisted that prudence and proper action demanded intensive work directly on the fire during the night. Humidity was high (80%) and the wind was quiet, so fire would have made little progress. The ground was relatively

flat and safe to work on, and fire trails could and should have been constructed to assure the fire's containment in the flat area and to prevent its spread up the slope of Camp Creek Ridge, where it might (and subsequently did) endanger the adjacent slash and timber. Men, tools and equipment were abundantly available for this purpose and could have built trails completely around the 60-acre fire by 8 or 9 a.m., August 7 (Tr. VIII, 2393-98, 2615-18, 2651-58; IX, 2724, 2730, 2877-80; X, 3060-64; Exs. 12; 13, p. III-1-4; 40; 41; 43; 150, pp. 41-43).

This inattention and negligence are included within the district judge's Finding XVI, when he said:

> "District Ranger Floe and his subordinates * * * failed to act as promptly, vigorously and continuously as they were required to do in the exercise of ordinary care in attacking in the Heckleville spot fire, and in attempting to confine it to the 60-acre area. * * * " (R. 235)

This also falls within the purview of the statement,

> " * * * the fire was operating as a result of the negligence in a larger area than it would have been had there been no negligence. * * * by reason of that fact this fire had more areas in which it could break over the lines on the afternoon of August 7 and get into the 1600-acre area. * * * " (R. 283-84)

August 7—Morning

Dawn broke between 4 and 5 a.m. on August 7. By all standards and in the undisputed opinion of experts, dawn is the best and most effective time to fight a fire. The humidity is still high, there is little or no wind,

and daylight permits more effective operation of bulldozers and equipment. Yet not a man or piece of equipment was working on the fire at dawn. In fact, it was not until between 6 and 7 a.m. that work started (Find. XI, R. 233). This flagrant failure was also within the scope of the trial judge's findings that the Forest Service men failed to act as promptly, vigorously and continuously as they were required to do (R. 18, 177; Tr. II, 615-26; IV, 1066, 1073-75; V, 1395, 1471-72, 1546-47; VIII, 2398-2401, 2616-18, 2656-58; IX, 2879-80; X, 3063-67; XIII, 4163; Exs. 12; 13, p. III-1-4; 38; 39; 40; 41; 43; 111; 150, p. 42; HQ 21-22).

Afternoon, August 7 and Later

By 12:30 p.m. August 7, fire trails had been constructed around the fire, but it should be noted that the fire trail along the south boundary of the fire was at the top of the ridge, rather than at the toe of the ridge where it could have been constructed during the night and early morning hours. As a result, the fire crept up the slope of the ridge during the morning (R. 18, 177; Find. XI, R. 233; Tr. II, 615, 620-26; IV, 1074; V, 1406, 1470, 1471).

About 2:30 p.m. the breeze stiffened and carried sparks and fire up the ridge and over the fire trail into the adjacent slash and sapling timber—precisely the event which could have been avoided had the Forest Service acted as promptly, vigorously and continuously as they were required to do in the exercise of ordinary care (R. 177; Find. XI, R. 233; Tr. II, 615, 619-25; IV, 1073-75; V, 1474).

The fire that blew over the fire trails the afternoon of August 7 engulfed an area of 1600 acres to the south and southeast of the Heckelville spot fire (R. 18). See attached Appenix E and Exhibit 112.

The fire was contained within the 1600-acre area by August 10. To contain it, hundreds of men worked and much equipment was used, with work going on day and night. See Exhibit 66 for details of the organization and of men and equipment. During the three days needed to bring the 1600-acre area fire under control the Forest Service spent many times what it would have cost to suppress and completely control the fire by 2 or 3 p.m. on August 6, had District Ranger Floe acted as promptly and vigorously as prudence and his duties required, for it took several hundred men and lots of equipment more than three days to bring the fire under control within the 1600-acre area (R. 18-20, 177-78, 203; Find. XI, R. 233; Find. XII, R. 233-34; Exs. 112, 127, 134, 148; HQ 19-25).

We do not advocate extravagance, but it is impossible to condone neglect of duty or penny-saving at the risk of millions of dollars of property.

Because of neglect, the spot fire became a 60-acre fire. Because of neglect, the fire became a 1600-acre fire. From the 1600-acre stage the fire escaped and burned everything within an area 20 miles in length and up to five miles in width. It is this continuous fire which damaged appellant and many others (R. 175, 177, 178; Find. XII, R. 233-34, R. 258-59).

August 11 to September 19 —

The 1600-Acre Mop-Up Period.

A fire trail was built around the perimeter of the 1600 acres (R. 198).

In the mop-up, effort was made to get the fire dead out within a strip approximately 50 feet wide just inside the perimeter of the 1600-acre area. Mop-up elsewhere in the area included putting out smokes whenever they were spotted. Smokes would appear from time to time during the period from August 11 to September 19 in many parts of the 1600-acre area, including parts of the 50-foot strip around the perimeter (Tr. IV, pp. 1099-1103). The number of men working on mop-up was gradually reduced until September 1, after which only about five men were kept on (Tr. IV, pp. 1103-1109). They worked only from 8 a.m. to 5 p.m. The men working on mop-up were not deployed equally all over the 1600 acres, but spread in crews and would be moved from place to place as needed to put out smokes and fires.

Within the 1600-acre area were several so-called landings, which are points to which, in the course of logging, felled and bucked logs are yarded for loading onto trucks. At landings logs are trimmed and sometimes broken, and some bark is knocked off in the handling process. Consequently there are accumulations of logging debris and inflammable material at and around landings. Two of those landings near the westerly side of the area are indicated on Ex. 112 as L-1 and L-2. Landing L-1 was adjacent to a gravel pit, and while it

had little or no debris on its surface, there was debris accumulated under the dirt and gravel which had been placed on its surface, and fire continued to burn and smolder in that landing (R. 19).

Landings L-1 and L-2 showed smoke from time to time, usually during the middle of the afternoon. Floe and Evans knew of the existence of fire in these landings (R. 177-8).

It is of special significance that two fires broke out on the afternoon of September 13, 1951 (just one week before the big break-out), adjacent to the fire line on the west side of the 1600-acre area. The points at which they broke out are indicated on the map, Ex. 112. Several Forest Service men and a Fibreboard tank truck suppressed those fires by 2:00 a.m. the following morning (R. 198).

Escape of Fire from 1600-Acre Area—Sept. 19-20

During the night of September 19-20 east or northeast winds occurred, bringing lower humidity and warm temperature. At 3:15 a.m., September 20, fire was observed west of the 1600-acre area by a State lookout stationed about 20 miles west of the 1600-acre area. The District Ranger was notified of the fire at 3:45 a.m. by telephone. The fire spread very rapidly, finally burning an area approximately 20 miles in a northeast-southwest direction and up to five miles in a north-south direction. The approximate boundary of the fire is shown on the aerial photograph, Ex. 127, and on the maps, Exs. 134 and 148. The fire reached

the vicinity of Forks about 9:30 a.m., September 20. Appellant's lands, timber and other property were burned, resulting in damage to appellant, the amount of which has been stipulated to be $895,000.00, for which recovery is herein sought (R. 178, 200, 173).

By the time the fire was discovered there was nothing anyone could do about it, and it was not until four days later that, with the aid of rainfall, the fire was controlled.

While appellant has asserted and is convinced that the Forest Service was negligent in its mop-up and care of the fire in the 1600-acre stage and in failing to have a patrol present during the night of September 19-20, when the fire escaped, the trial judge has found that it was not shown by a preponderance of the evidence that the government failed to use reasonable care during the mop-up period or during that night (Finding XVII, R. 235). We assume, solely for purpose of argument, the correctness of that finding.

There is no question that damage sustained by appellant came from the fire that started August 6, spread to the 1600-acre area on August 7, and escaped from the latter area September 20 (R. 233-4, 178). During the argument on post-trial motions, the court said (R. 259):

> "There again it is so self-evident. It is silly to state it. Nobody is suggesting that plaintiffs' damage came from any other source except the fire which escaped on this morning from the 1600-acre area."

QUESTIONS INVOLVED

1. Where there is undisputed credible evidence, including that of the government's own witnesses, that the fire could have been completely extinguished by exercise of ordinary care in its initial stages:

> (a) has it been established by a preponderance of the evidence that there is a causal relationship between the government's negligence and the existence of fire in the 1600-acre area; and
>
> (b) may the district judge justifiably disregard all such undisputed credible evidence?

2. Where the district judge has found that small fires in or near heavily forested Soleduck District lands during the hot and dry fire season of 1951:

> (a) "may be readily controlled and suppressed by prompt and thorough action"; (b) "rarely remain small or die out unattended without active control and extinguishment"; (c) "by the minute are more difficult and dangerous to confine and control as they spread under conditions of wind, heat and low humidity"; (d) require "urgent speed, vigorous attack and great thoroughness" in suppression; (R. 197, 238-9);

and where the district judge also has found that Washington forest fires are:

> "extremely dangerous," have "tremendous potential for damage to life and property" and by reason of "a few minutes' delay, a man or two less than needed and too little of the right kind of equipment" may spread from "a small fire quickly disposed of" to "a conflagration of extensive proportions" constituting "great hazard of vast in-

jury and damage" and "resulting in great loss of life and property" (R. 193-97, 238-9; Find. IX, R. 232),

and where it is self-evident that Rayonier's damage is precisely within the risk thus defined, was the government's August 6-7th negligence a proximate cause of Rayonier's damage?

3. If the government's August 6-7th negligence was the cause in fact of the risk of harm that spread to the 1600-acre area and if that risk of harm continued until acted upon by the September 19-20th wind and weather which carried fire to appellant's property:

(a) does the fact that the wind and weather were so exceptional as to be considered an "act of God" relieve the government from liability; and

(b) is the government to be relieved of liability because its active negligence and the "act of God" did not occur simultaneously?

All of these questions were raised by appellants' motion to alter and amend findings of fact, conclusions of law and judgment and to make additional findings and in the oral argument thereon (R. 219-24, 244-95).

SPECIFICATIONS OF ERROR

The district judge erred:

1. In making each of the following findings; in denying appellants' motion to delete the same; and in denying requested alteration and amendment thereof (R. 221-24):

(a) The last sentence of original finding XII (R. 211), amended finding XIII (R. 234). See R. 267-69;

(b) The last two sentences of original finding XV (R. 212); the last two sentences of amended finding XVI (R. 234). The issue on this finding was raised by necessary implication by appellants' motion and was the subject of oral argument (R. 282-86);

(c) Original finding XVII (R. 213), amended finding XVIII (R. 235-36). See R. 269 *et seq.;* and

2. In making the following conclusions; in denying appellants' motion to delete the same; and in denying requested alterations and amendments thereof (R. 222-23):

(a) The second sentence of original conclusion III (R. 214), amended conclusion III (R. 236);

(b) Original conclusion V (R. 214), amended conclusion V (R. 237);

(c) Original conclusion VI (R. 214), amended conclusion VI (R. 237); and

all similar findings and conclusions in the memorandum decision (R. 228, 236).

All the foregoing findings and conclusions are erroneous because they disregard undisputed credible evidence that the government's negligence was the proximate cause of the stipulated damages.

3. In his application of the law governing the intervention of fortuitous weather upon the fire in the 1600 acres caused by the government's August 6-7th negligence. Memorandum decision, R. 201-03, 239.

4. In denying Rayonier's motion to enter judgment in favor of Rayonier (R. 216-17, 223, 270, *et seq.*).

SUMMARY OF THE ARGUMENT

First, the negligence of the Forest Service during the initial period of the fire, August 6 and 7, was clearly the cause in fact of the existence of the fire in the 1600-acre area, and the risk of harm thus negligently created continued until it was acted upon by the wind during the night of September 19-20.

Second, the risk of harm thus negligently created directly and proximately contributed to and caused the damage to appellant when the wind carried the fire out of the 1600 acres and into appellant's property.

Third, the government's August 6-7th negligence was the proximate cause of Rayonier's damage because: the harm that Rayonier suffered was within the scope of the general type of harm, a risk of which was created and increased by said negligence; the continuing risk of that harm did not expire prior to September 19-20; and because the Forest Service's subsequent mop up operations, even if prudent, did not insulate the government from liability.

Fourth, the fortuitous weather of September 19-20 cannot exonerate the government from liability for its August 6-7th negligence because the fortuitous weather did not cause Rayonier's damage and because, as a matter of law, when a person's negligence has created a continuing risk-pregnant condition which is acted upon by an extraordinary force of nature, the person who has created the risk will be liable unless the harm suffered is of a kind entirely different from and outside the scope of the risk which made the defendant's conduct negligent.

Therefore the government is liable, and this Court should direct entry of judgment for appellant.

ARGUMENT

PART I

The Negligence of the Forest Service Employees on August 6 and 7 Was a Cause in Fact of the Fire in the 1600-Acre Area

With all due respect, we submit that the trial judge erred materially, as a matter of law, in finding that it has not been established by a preponderance of the evidence that had the Forest Service's negligence not existed, the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area (Finding XVI, R. 235). To arrive at that finding he failed to give due weight to undisputed evidence, and he erroneously characterized as speculative the evidence "as to whether or not there would or would not have been fire in the 1600-acre area regardless of the negligence of the defendants" (R. 285, R. 235).

The record includes those pages of the trial judge's Memorandum Decision and his personally composed Findings of Fact which, after argument on appellant's post-trial Motions, the trial judge ordered withdrawn. Compare the original Memorandum Decision (R. 198 and 202) with amended pages of the Memorandum Decision (R. 239 and 240). Also compare original Finding XV (R. 212) with Amended Finding XVI (R. 234-235). See also R. 241-243.

Before these amendments were made by the trial

judge, he explicitly stated that because of the negligence of the Forest Service,

> " * * * the first small fire on the right of way spread from its original limited area to the 60-acre tract on August 6 and on the following day to the 1600-acre area * * *." (R. 198)

and that

> "Because of the failure of the United States employees to expeditiously and fully perform such duty during the initial period of the fire it spread first to the 60-acre tract and from there to the 1600-acre area." (R. 202)

Original Finding XV read:

> "Such failure to exercise ordinary care proximately contributed to causing the spread of the original Heckelville spot fire to the 1600-acre area." (R. 212)

The trial judge did not change his mind as to the facts which had been established by the evidence. He said (R. 292), " * * * I am satisfied that the Forest Service in what I call 'the initial fire period.' August 6, 7, did not act as promptly and fully and effectively as reasonable care required. I do not in any manner withdraw from that by anything that I may now say. * * * " Precisely what it was that the the trial judge tried to express by his amendments is rather confused. The following colloquy between the court and the government's attorney appears (R. 286):

> "MR. CUSHMAN: Would it be fair to state in effect, then, that such failure to exercise ordinary care was one of the causes?

THE COURT: Well, of course, that follows from it. You don't have to state it."

The trial judge agreed (R. 283-4) that the fire was operating as a result of the negligence in a larger area than it would have been had there been no negligence, and that by reason of that fact the fire had more areas in which it could break over the lines on the afternoon of August 7 and get into the 1600-acre area. Yet in his amendment to the Memorandum Decision he added (R. 240) " * * * It is not shown by the evidence that but for such negligence the Heckelville fire would have been wholly extinguished prior to extending to the 1600-acre tract. * * * "

The trial judge was clearly in error. The undisputed evidence establishes that the fire could have been controlled and extinguished at the spot fire stage and at all other stages prior to its reaching the 1600-acre area by the exercise of due care. The fire never would have reached the 1600-acre area but for the negligence of the Forest Service.

We direct this court's attention to Findings of Fact VI, VII, VIII and IX (R. 231-232). The trial judge there refers in general terms to the facts recounted in the Statement of the Case in this Brief. There is no dispute about those facts. On the basis of those facts the trial judge found in Finding XVI (R. 234) that the employees of the United States "failed to act as promptly, vigorously and continuously as they were required to do in the exercise of ordinary care in attacking the Heckelville spot fire and in attempting to confine it to the 60-acre area." Conclusion of Law IV (R. 237) is: "Defendant United States was negligent

in failing to use reasonable care in fighting the Heckelville fire on August 6 and 7." In his amendment of the Memorandum Decision the trial judge stated: "The United States employees failed to expeditiously and fully perform such duty during the initial period of the fire * * * " (R. 242-243).

If the United States employees failed to act as "promptly, vigorously and continuously" as they should have "in attacking the Heckelville spot fire" and "in attempting to confine it to the 60-acre area," the trial judge necessarily had in mind that under the facts and conditions as they existed:

> The Forest Service should have called for assistance from outside sources more promptly so as to get sufficient men and equipment to the fire sooner than was done.
>
> Vigorous action would have had more men and equipment on the fire, and more men and equipment were available to go to the fire.
>
> Continuous action, which prudence required, would have kept men fighting the fire the clock around on August 6 and 7.

It is significant that nowhere and at no time did the trial judge ever find, or express himself as believing, that the fire would have escaped the spot fire stage or would have escaped from the 60-acre area had the Forest Service not been negligent.

Let us review what would have happened had the District Ranger acted promptly and vigorously.

> A State fire suppression crew of seven or eight men were available at Tyee, a distance of 18 miles from

Heckelville, and could have been at the fire within 55 minutes. They were not called until 2:35, and arrived at 3:30.

Fifty loggers were rolling into Fibreboard Camp One from 12:50 p.m. on, and several logging truck drivers were also there. That is a distance of a little over a mile from the fire, and they could have been on the fire within 30 minutes if they had been called. They were not called.

The Rayonier logging camp at Sappho had over 140 loggers arriving from the woods operation about 1:00 o'clock. Those men lived at Sappho. Also at Sappho were large quantities of fire-fighting tools and equipment, as well as buses and trucks to carry the men close to the scene of the fire. A large force from Sappho could easily have been brought to the scene of the fire within an hour and one-half after they were called. They were not called until after 2:30 p.m. In addition there was a locomotive with water and fire-fighting hoses that could have been brought to the fire about an hour after it was called. It was not called until 1:45, and then it was called by the PAW, not by Floe.

While there was no lack of fire-fighting tools and equipment at the above sources, the Snider Ranger Station had on hand enough to equip 100 men, if needed.

It is thus apparent that more than sufficient men with tools could and would have reached the scene of the fire between 1:30 and 2:30 p.m., and in any event much sooner than they did arrive, had the District Ranger acted promptly and vigorously as the circumstances required.

On the undisputed facts, the Heckelville fire would never have gotten beyond the spot fire stage, had due care been exercised by the Forest Service. The government's own witnesses support this.

Bear in mind that it is not necessary to show that the fire could have been suppressed by any precise hour or at any precise stage. Witnesses express their thinking in various terms. The important fact is that the fire could and would have been suppressed before it reached that stage which made it difficult to control and which, by its nature, increased the danger and potential for spread to larger areas.

District Assistant Evans, Fire Control Officer and the first man who reached the fire, at 2:30 p.m., said he then could have controlled the fire with ten men (Tr. III, p. 1038).

District Ranger Floe, the man in charge, the man whose duty it was to get sufficient men and equipment to the fire, said the fire could have been put out with ten men or less (Tr. II, p. 608-9; Tr. III, p. 743).

The government's expert, George Drake, said ten or fewer men could have controlled and extinguished the fire (Tr. XII, pp. 3947-8). He also testified that as late at 3:30 p.m., twenty men could have controlled it (Tr. XII, pp. 3949-50).

The record of the Forest Service's own Board of Review contains the following comment by Mr. Gustafson, the Chief Fire Control Officer of the entire Service, Exhibit 123, second page (numbered "7"):

"There are some phases of initial action on

these series of fires that do not measure up to what I consider should have been done. District Ranger Floe at Snider knew by 1:00 P.M.—lookout initial report of fire which later got away—that the railroad had started at least 3 fires. He should have expected the worst and proceeded on the basis that there might be more fires. If he had done this he probably would have requested (1:05 P.M.) the State suppression crew of 7 men to start to Snider to await developments. If they had gotten underway by 1:10 P.M. they probably would have arrived on the fire discovered at 1:00 P.M. by around 2:00 P.M.; probably a half hour ahead of the Forest Service suppression forces. It is probable that this action may have resulted in the control of the Port Angeles Western fire at a couple of acres instead of in excess of 30,000 acres. At least there was this chance we lost which, if taken, may have saved this disastrous fire."

That is all testimony of the government's own witnesses on the question of the number of men necessary to put out the fire at the spot fire stage.

Charles Cowan, Manager of the Washington Forest Fire Association for thirty-one years, testified that if prompt action had been taken, from 7 to 12 men could have suppressed the Heckelville spot fire (Tr. VIII, p. 2393).

H. H. Jones, a man of long experience in forest fire fighting, and from 1940 to 1943 in charge of the Washington State Forestry Division Fire Control, testified that in his judgment a prudent ranger would have dispatched 44 men to arrive at the scene by 2:30 p.m. (Tr. VIII, pp. 2593-4).

Walter Schaeffer, Associate Professor in the University of Washington College of Forestry and with extensive forest fire fighting experience, testified that the State fire crew, of 7 or 8 men, could have suppressed the fire if they had been ordered out promptly (Tr. VIII, p. 2651).

Norman Jacobson, a man of many years' experience in fighting forest fires, testified that a prudent district ranger would have promptly called the State fire crew of seven or eight men and that they could have put the Heckelville fire out by 2:30 or shortly thereafter (Tr. X, p. 3056). Mr. Jacobson also described other available "flying squadrons," *e.g.,* the U. S. Park Service, who could have been at the fire by 3:00 p.m.

"Get the Fire While It's Small"

Prompt action by Floe was notably lacking. He tried to justify his inaction by saying that he relied upon the PAW locomotive at Camp One to return to the fire. This excuse is a poor one, as the trial judge found.

At 12:45 p.m., after receiving Evans' radio report from the Section 35 fire, Floe said he would ask the PAW locomotive to return from Camp One to help Evans at that fire, and he then telephoned the PAW for that purpose (Tr. III, p. 748). It would take but a few minutes for the locomotive to be on its way back. There is no reason for Floe not to be informed that something was wrong because he not only could get information by telephone at Camp One, but he also had the North Point Lookout who could observe Camp One and the PAW tracks and could report to Floe by radio. When

he learned at 1:00 o'clock of the Heckelville fire, there was immediate need for further information as to the whereabouts of the locomotive and whether it could help on this new fire. Yet he did not act on the basis of its breakdown until 1:45, when he had PAW call for the Rayonier locomotive at Sappho. In the face of the critical fire hazard and Floe's knowledge that the PAW locomotive had already started several fires, Floe was obviously imprudent in his long delay before calling for outside help. Add to that Floe's knowledge at 1:00 p.m. that the Heckelville fire had already been burning about an hour, that there were severe fuel hazards in the open flat area around the Heckelville fire, that fire increases in geometric proportion, and that the effective range of a locomotive and its hose is limited, not only by length of hose, limited water and small crew, but also by its inability to get too close to fire, and it is obvious that Floe just wasn't thinking, or that he was foolish or negligently indifferent. The judge so found. The Forest Service Board of Review so found. The expert witnesses so believed. And common sense compels the same conclusion.

Exhibit 150, an accepted text on fire fighting, says (p. 33):

> "Initial action on small fires. Hit it hard at the start and have it over. Take enough men to make sure of that."

and at page 33 it says:

> "Summon aid if needed." (Tr. III, p. 778)

Exhibit 13, The Forest Service Fire Control Handbook, says, on page 1:

"Whether a smokechaser or firegoer is dispatched to a fire alone or is placed in charge of a small crew, the objective to 'Get the Fire While It's Small' remains the same."

Mr. Floe agreed that a cardinal rule is to get the fire quickly and while it is small (Tr. III, p. 761).

Exhibit 13 says, p. 15:

"Success in fighting a fire depends to a considerable extent on being able to anticipate the burning conditions of the future as well as to recognize those of the present."

Page 14 enumerates conditions to consider in planning the attack on a fire, including slash areas and spot fires that are spreading rapidly.

Exhibit 150 says on page 41:

"Fire fighting is the acid test of a protective organization and men. It is an emergency job where success or failure hinges not only on experience and skill but also to a very large extent on the speed with which various phases of the work are successfully completed. *The urgent need for speed must be kept constantly in mind. There is need of speed in checking all rapidly advancing fires before they cover a large area.*" (Italics supplied) * * * "It is this necessity for speed which justifies large crews, long hours and maximum efforts * * *." (Tr. III, p. 779)

To all of these quotations District Ranger Floe professed to subscribe. But in the face of these sensible, obvious principles he did practically nothing—and absolutely nothing effective—for an hour and a half after he first learned of the fire.

With such a record of responsible and undisputed testimony of the men at the scene of the fire and of the experts for both parties, and the basic principles prescribed by the textbooks, how can it be said that it is a matter of speculation and cannot be determined as a reasonable probability, under the evidence, as to whether the fire might have been contained or suppressed at the spot fire stage? Where in the record is there any evidence, credible or otherwise, to the contrary? There is none. Upon what grounds could the trial judge disregard that evidence or say that it is not reasonably probable that the fire could have been contained or suppressed at the spot fire stage? The trial judge erred. Since the fire could have been contained and suppressed at the spot fire stage but was not because of negligence, there is necessarily a causal connection between that negligence and the subsequent larger fire. Had there been no negligence, there would have been no later fire.

Negligence After the Spot Fire Stage

The trial judge found the Forest Service employees to be negligent all through the August 6th and 7th period, and that negligence relates to the suppression and containment of the fire within the 60-acre area, as well as to the earlier spot fire stage. He found the fire was not fought "vigorously and continuously." After men did arrive at the Heckelville fire at 2:30 p.m., August 6, the only time when fire-fighting activity was not "continuous" was from evening of August 6 to between 6:00 and 7:00 a.m., August 7. It necessarily follows that the trial judge found the Forest Service to be negligent in

not fighting the fire throughout the night of August 6 and 7 and in not having a large complement of men and equipment at work by dawn, around 4:00 a.m., on August 7.

The following factors and rules in fire fighting are established by the texts and subscribed to by the expert witnesses:

The Forest Service Fire Control Handbook, Ex. 13, p. 4, says:

> " * * * Light fuels dry out during the day when air is dry and absorb moisture at night when the air is damp.
>
> Therefore, a fire usually burns more rapidly in the daytime than at night. Firefighters make use of this factor by doing all work possible on a fire during the night and early morning when the fuels are the dampest. * * * "

Ex. 13, p. 18:

> "Under normal conditions, forest fuels recover moisture between the 4:30 p.m. reading and the 8:00 a.m. reading on the following day. * * * "

Ex. 13, p. 23:

> "*Fire Habits*: It can generally be expected that the worst burning period of the day will be between 10:00 a.m. and 5:00 p.m. Under normal conditions fires die down after 6:00 p.m. and are more susceptible to control. During the night, fires usually spread the least, but they pick up gradually after sunrise. These changes are usually due to variations of the relative humidity and fuel-moisture content. * * * "

Ex. 13, p. 40:

> " * * * Night scouting is particularly important during the first night, and the information obtained made available to the fire boss in sufficient time so action can be taken at daybreak.* * * "

Forest Service Manual, Ex. 12, Section 602.4, Subsection G:

> "Night work is *required* if conditions permit. Otherwise, attack with full morning shift strength on the control line at daylight is mandatory. Double or triple shifting of crews and overhead with an overlap during the heat of the day is desirable under many conditions."

Ex. 150, p. 41, says:

> "There is need for speed to get fires under complete control before 10:00 a.m. * * * It is this necessity for speed which justifies large crews, long hours and maximum efforts * * * "

> "For the first day it is desirable to attack as soon as crew arrives. If by working the balance of the day and all night they can control the fire, go to it."

Plaintiff's expert witnesses, whom the trial judge obviously believed, testified that a prudent ranger would have had men working throughout the night of August 6-7 building hand trail around the fire and burning out areas inside the fire trail, and would have had considerable men and equipment actively working on the fire at the first crack of daylight, about 4:00 a.m., on the morning of August 7. They were all of the opinion that had such work been carried on, a fire trail around the 60 acres would have been completed before 9:00 a.m., August 7, and that the fire would not have

escaped from the 60-acre area in that event. Charles C. Cowan, Tr. VIII, pp. 2396-2401. Walter H. Schaeffer, Tr. VIII, pp. 2651-2657. H. H. Jones, Tr. VIII, pp. 2615-2618, Tr. IX, pp. 2876-2880. Norman G. Jacobson, Tr. X, pp. 3060-3065.

Even Leslie L. Colvill, of the U. S. Forest Service, testified (Tr. VIII, p. 4168) that he thought a District Ranger who, having the men and equipment available to do so, failed to have a fire trail around the area by 10:00 a.m., and who failed to start work at daylight in the morning, would be imprudent.

Bear in mind that there were ample men, tools and equipment available for fighting fires around the clock. It is worthy of note that when the fire got into the 1600-acre area, there were hundreds of men on the job night and day. See Exhibits 65, 66 and 158. The trial judge made a special point to find that fire and other perils in forest areas are a matter of great concern to the people in that vicinity, and he also made special note of the Fire Suppression Plan (Ex. 14), which sets forth a list of the available men and equipment in the general area.

The foregoing fairly summarizes facts and opinion which the trial judge, by his finding of negligence in failing to take vigorous and continuous action, necessarily believed. There was no evidence really to the contrary. There were excuses offered, such as the greater danger in night work and Floe's thought that he couldn't accomplish much that night. But the judge obviously rejected those excuses.

So here again we challenge the propriety of the find-

ing that "it has not been established by a preponderance of the evidence that had [the Forest Service] negligence not existed, the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area."

August 6-7 Negligence Was the Cause in Fact of Fire in 1600-Acre Area

How far must a plaintiff go? It is clear that the rangers in charge violated fundamental rules of forest fire fighting; that they failed to avail themselves of equipment, resources and carefully prepared plans which they were supposed to use and employ. Granted that since the fire was not put out no one can say to a certainty that the fire could have been suppressed at a specific moment or at a specific place. Yet the trial judge implies, at least, that such is the requirement. Necessarily under the circumstances of this case, we must look to the judgment and opinion of men of special knowledge and experience, and to the teachings and standards established by the accepted text writers. There is nothing improbable or contrary to common experience in the opinions they expressed. The trial judge adopted their views—up to the point that he agreed the Forest Service was negligent. But how, or upon what evidence or upon what personal or common experience, could the judge fairly conclude that the negligence had no causal relationship to the spread of the fire?

We respectfully suggest that judgment and opinion as to whether or not a fire could be controlled and sup-

pressed in a forest area, as to the number of men required to control and suppress it at various stages, and as to the effect of fighting fire at night and with full strength at daybreak, can best be given by men experienced in fighting fires; that the weight to be accorded the judgment and opinion of such men should be considerable, even to the point of conclusiveness, and that one who does not have such experience is not qualified to reach a contrary conclusion, especially when there is no disagreement on the subject between both parties' witnesses and there is no reason for the trier of the fact to disregard the testimony.

The view taken by the trial judge, if correct, would place an impossible burden upon injured parties and would prevent and frustrate substantial justice. He would in effect require plaintiffs in a civil suit to prove their cases beyond a reasonable doubt. That is not the law. The Washington Supreme Court, in considering whether or not a plaintiff had proved that a fire started through the negligence of another, stated the rule as follows:

> "The rule is well established that the existence of a fact or facts cannot rest on guess, speculation, or conjecture. It is also the rule that the one having the affirmative of an issue does not have to make proof to an absolute certainty. It is sufficient if his evidence affords room for men of reasonable minds to conclude that there is a greater probability that the thing in question, such as the occurrence of a fire, happened in such a way as to fix liability upon the person charged therewith than it is that it happened in a way for which a person charged would

not be liable. *In applying the circumstantial evidence submitted to prove a fact, the trier of fact must recognize the distinction between that which is mere conjecture and what is a reasonable inference.*" (Italics supplied)

Home Insurance Company v. Northern Pacific Railway 18 Wn.2d 798, at page 802, 140 P.2d 507, at page 509 (1943). See also *Nelson v. West Coast Dairy Company,* 5 Wn.2d 284, 105 P.2d 76 (1940). *Garretson v. Tacoma R & Power Co.,* 50 Wash. 24, 96 Pac. 511 (1908).

An "inference" is defined in *Page v. Spokane City Lines, Inc.,* 51 Wn.2d 308, 317 P.2d 1076 (1957), as "a conclusion drawn by reason from premises established by proof," and in *Peterson v. Betts,* 24 Wn.2d 376, 165 P.2d 95 (1946), as "a logical deduction or conclusion from an established fact. The mental process is: Since this is so, it must follow that it is also true, etc. * * * " It is necessary and required that inferences shall be drawn and acted upon.

The only logical and reasonable deduction and conclusion from the evidence in this case is that had the Forest Service employees exercised due care, the fire would have been contained and suppressed at the spot fire stage on August 6 and, failing that, in the 60-acre area on August 6 and 7. Since the fire was not so contained and suppressed, but could have been, it is a logical and reasonable deduction and conclusion that its spread to the 1600-acre area was in fact caused and contributed to by such negligence.

What other deduction or conclusion could logically or reasonably be reached? We repeat that nowhere did

the trial judge find that the fire would have escaped in spite of the Forest Service's negligence. If there is anything speculative about this situation, it is the existence of any logical or reasonable explanation for the fire's escape other than the negligence of the Forest Service.

The negligence of the Forest Service employees on August 6 and 7 created a risk which spread to and continued in the 1600-acre area. There can be no argument about that. Creation of a risk is an essential ingredient of negligence. The risk created was one which endangered appellant's property, and the damage which appellant eventually suffered resulted from that risk and was foreseeable by the Forest Service employees. Floe testified that at 1:00 p.m., August 6, when the Heckelville fire was reported to him, he then knew that if that fire were unattended, it could spread easterly, southerly and westerly to the Pacific Ocean (Tr. III, pp. 738-740). The trial judge so found. Finding IX, R. 232.

It is the province, and even the duty, of this court, on the basis of the undisputed credible evidence in the record, to make findings and direct judgment in favor of the party whose case is supported by such evidence. *Meyer v. Strom,* 37 Wn.2d 818, 226 P.2d 218 (1951); *Shultes v. Halpin,* 33 Wn.2d 294, 205 P.2d 1201 (1949); *U.S. v. 449 Cases Containing Tomato Paste,* 212 F.2d 567 (2nd Cir. 1954); *Chesapeake & Ohio Railway Company v. Martin,* 283 U.S. 209 (1930). We particularly commend a full reading of the opinion in *Ferdinand v. Agricultural Insurance Company,* 22 N.J. 482, 126 A. 2d 323 (1956). In the course of its lengthy and learned

discussion of the subject, the New Jersey Supreme Court said, at page 329:

> " * * * when the proof of a particular fact is so meager or so fraught with doubt that a reasonably independent mind could come to no conclusion but that the fact did not exist there is no question for the jury to decide. Likewise, when the proof on a question of fact is so strong as to admit of no reasonable doubt as to its existence, again, there is no question for the jury to decide. In both these cases the court must make the determination and advise the jury accordingly * * *."

We submit that from the evidence in the case at bar, reasonable minds could not differ about the fact that the fire, both in its spot fire stage and at all times prior to its spread to the 1600 acres, could have and would have been controlled and suppressed but for the negligence of the Forest Service employees.

PART II.

Argument on Proximate and Intervening Cause

The foregoing argument clearly establishes that the Forest Service's August 6-7th negligence caused the fire to be in the 1600-acre area. The district judge said that it is self-evident that "but for" the fire's presence in the 1600-acre area on September 19-20, Rayonier would not have suffered damage (R. 258-60). Therefore, the Forest Service's August 6-7th negligence was the cause in fact of Rayonier's damage.

Now it will be demonstrated that this negligence was not only the cause in fact but also the proximate cause of Rayonier's damage because: the harm that Rayonier

suffered was within the scope of the general type of harm created and increased by said negligence; the continuing risk of that harm did not expire prior to September 19-20; and because the Forest Service's subsequent mop-up operation, even if prudent, did not insulate the government from liability.

The district judge was in apparent accord with this view because he stated that if the proof of cause in fact had not been speculative, he would have been required next to decide the issue of whether an "act of God" occurred on the night of September 19-20 (R. 283). The district judge would not have been required next to decide the "act of God" issue unless he had been satisfied that the government's negligence was a proximate cause of Rayonier's damage.

Therefore, the following argument will meet that issue and will demonstrate as a matter of law that the fortuitous weather of September 19-20 cannot exonerate the government from its August 6-7th negligence and that, accordingly, the government should be held liable for Rayonier's damages.

In the latter connection, appellant does not concede that the government has proved that the September 19-20th weather was unforeseeable in degree, the district judge having made no finding on this issue. However, being certain that the law is clearly in its favor, appellant will assume arguendo and for the sake of brevity that it could be found that such weather conditions were unforeseeable.

Foreseeability Is the Test of Proximate Cause

The test of proximate cause in Washington is "foreseeability." *Berglund v. Spokane County,* 4 Wn.2d 309, 103 P.2d 355 (1940); *McLeod v. Grant County School District,* 42 Wn.2d 316, 255 P.2d 360 (1953). This test identifies the general type of harm that may be foreseen—the general danger area that a reasonable person with ordinary experience would anticipate under all the circumstances—rather than the particular manner in which the risk culminates. *Lewis v. Scott,* 154 Wash. Dec. 509, 341 P.2d 488 (1959).

Applying the test, the district judge correctly defined in Amended Finding IX (R. 232) the general type of harm foreseeable as a consequence of the government's negligence. The harm suffered by Rayonier was clearly within the risk, so defined. See also, Memorandum Decision R. 193, 196-97 and 238. Chapter 76.04 RCW, especially RCW 76.04.450. *A. T. & S. F. R. R. v. Stanford,* 12 Kan. 354, 15 Am. Rep. 362; *Milwaukee, etc., Railway v. Kellogg,* 94 U.S. 469, 474; *Johnson v. Kosmos Portland Cement Company,* 64 F.2d 193 (6th Cir. 1933); *Irelan-Yuba Gold Quartz Mining Co. v. Pacific Gas & Electric Co.,* 18 Cal.App.2d 557, 116 P.2d 611 (1941); *Bloedel Donovan Lumber Mills v. United States,* 74 F.Supp. 470 (Ct. Cl. 1947), cert. den. 335 U.S. 814.

Therefore, it is clear that the government's August 6-7th negligence proximately caused Rayonier's damage and, as the district judge observed, a decision on the "act of God" is next required.

The government's contentions that the risk expired; that the damage was too remote; and that the government was exonerated by mop-up efforts are unmeritorious

However, at several hearings the government has contended that it was not liable to Rayonier because: The risk created by its August 6-7th negligence expired or was terminated; Rayonier's damage was too remote in time and space from the government's negligence; and because the government was exonerated from liability by its efforts to mop up the fire in the 1600 acres between August 10 and September 19. All of these contentions are unmeritorious.

The risk of fire in a forested area does not expire and cannot be terminated until the fire is extinguished. Chapter 76.04 RCW; *Willner v. Wallinder Sash & Door Co.,* 224 Minn. 361, 28 N.W.2d 682 (1947).

Remoteness of the harm from the time and place of the negligent act which caused or contributed to the continuing risk of harm has been refused as a limitation upon proximate cause and upon liability in Washington. The following quotation from Prosser on Torts, p. 349, § 48:

> "Remoteness in time and space undoubtedly is important in determining whether the defendant has been a substantial factor in causing the harm at all, and may well lead to the conclusion that he has not. But once such causation is found, it is not easy to discover any merit in the contention that such physical remoteness should of itself bar recovery. The defendant who sets a bomb which explodes 10 years later, or mails a box of poisoned chocolates from California to Delaware, has caused

> the result, and should obviously bear the consequences."

was approved in *Theurer v. Condon,* 34 Wn.2d 448, 209 P.2d 311 (1949). See also Prosser on Torts, 2d Ed., p. 264, and cases cited in fn. 78, p. 261, and fns. 96 and 97, p. 264; *Conrad v. Cascade Timber Co.,* 166 Wash. 369, 7 P.2d 19 (1932), quoting with approval from *Hardy v. Hines Bros. Lumber Co.,* 160 N.C. 113, 75 S.E. 855 (1912). Cases from other jurisdictions to the same effect are: *Chicago, R. I. & P. Railway Co. v. McBride,* 54 Kan. 172, 37 Pac. 978 (1894); *Phillips v. Durham & C. R. Co.,* 138 N.C. 12, 50 S.E. 462 (1905), citing a number of earlier authorities; *Kennedy v. Minarets & Western Railway Co.,* 90 Cal.App. 563, 266 Pac. 353 (1928); *Silver Falls Timber Co. v. Eastern & Western Lumber Co.,* 149 Ore. 126, 40 P.2d 703, 730-33 (1935); *Osborn v. City of Whittier,* 103 Cal.App.2d 609, 230 P.2d 132 (1951).

One who negligently creates a continuing risk cannot exonerate himself from liability by subsequent prudent efforts to overcome the hazard. In *Jess v. McNamer,* 42 Wn.2d 466, 255 P.2d 902 (1953), Judge Hamley said:

> " * * * The fact that, after appellant negligently created the risk, he exerted every effort to overcome the hazard, does not operate to cleanse the original act of its negligent character. This is made clear in 2 Restatement of Torts, 1181, § 437, where it is said:
>
> " 'If the actor's negligent conduct is substantial factor in bringing about harm to another, the fact that after the risk has been created by his negli-

gence the actor has exercised reasonable care to prevent it from taking effect in harm does not prevent him from being liable for the harm.' " 42 Wn. 2d 466, 470. See also, Comment (a) of § 437.

Therefore, the government's mop-up operations after August 10, even if prudent, do not exonerate the government from liability for the foreseeable consequences of its August 6 and 7th negligence. *Kell v. Jansen,* 53 Cal.App.2d 498, 127 P.2d 1033 (1942); *Willner v. Wallinder Sash & Door Co.,* 224 Minn. 361, 28 N.W.2d 682 (1947).

Concurring Acts of God

Having disposed of all possible contentions to the contrary, appellant has now established that the government's August 6-7th negligence proximately caused Rayonier's damage and the government is liable to Rayonier unless the intervention of unusual weather conditions on September 19-20 immunizes the government from liability.

In his memorandum decision the district judge, after finding no negligence between August 10 and September 20, said:

" * * * If Forest Service personnel were guilty of negligence proximately contributing to the breakout of the fire on the morning of September 20, the defendant United States would be liable for all damage resulting therefrom even though an Act of God concurred and combined with defendant's negligence in effecting the breakout and in producing the damage. On the other hand, if Forest Service personnel were not guilty of negligence proximately contributing to the breakout of the

> fire, then the adverse weather conditions, whether an Act of God or not, were the sole proximate cause of the escape of the fire and the damage resulting therefrom." (R. 201-02, 239).

At R. 203 the district judge said:

> "From the facts thus summarized and the principles of law earlier stated herein, these ultimate findings and conclusions follow: The Heckleville fire was not negligently started by any defendant; negligence chargeable to the United States proximately contributed to spread of the fire to the 1600-acre area, without resulting damage to plaintiffs; communication of fire from such area to plaintiffs' property was not proximately due to negligence of any defendant; such occurrence happened fortuitously and despite the exercise of reasonable care by defendants. Accordingly, liability for plaintiffs' damage in whole or in part has not been established as to any defendant."

It is respectfully submitted that the foregoing statements from the memorandum decision constitute erroneous application of the rule to the facts at bar.

The district judge's statements constitute erroneous application of the law because; (1) they would require that the *act* of negligence and the "*act* of God" occur simultaneously; and (2) they fail to recognize that negligence is a concurring proximate cause if, previously, it has created or contributed to a continuing risk which results in harm.

It is not a question of concurrence—in the sense of near simultaneous occurrence—of the negligent acts and the alleged act of God. It is concurrence in the

sense that the defendant's antecedent negligence has contributed to the continuing presence and existence of a risk or condition that may eventuate in harm if an act of God should intervene. *Brewer v. U.S.,* 108 F.Supp. 889 (M.D. Ga. 1952). According to the rule correctly stated, such a condition, subsequently acted upon by an act of God, makes the defendant liable if the general type of harm suffered by the plaintiff is within the scope of the risk, the creation or increase of which made the defendant's conduct negligent. *Johnson v. Kosmos Portland Cement Company,* 64 F.2d 193 (6th Cir. 1933).

The government's August 6-7th negligence and the continuing fire hazardous condition which it caused cannot be omitted from the application of the rule. The application of the rule is erroneous if, as in the district judge's memorandum opinion, it is restricted solely to an examination of the government's negligent acts and omissions, if any, occurring after August 10, which may have contributed to the fire's breakout.

Text Authorities

***Restatement of the Law of Torts*, § *451*. Extraordinary force of nature intervening to bring about harm different from that threatened by actor's negligence.**

"An intervening operation of a force of nature without which the other's harm would not have resulted from the actor's negligent conduct prevents the actor from being liable for the harm, if

"(a) the operation of the force of nature is extraordinary, and

"(b) the harm resulting from it is of a kind

different from that, the likelihood of which made the actor's conduct negligent.

"*Comment:*

"a. In order that an extraordinary operation of a natural force may relieve from responsibility an actor whose negligence *has created a situation upon which the natural force has operated,* the harm brought about by the intervention of the force of nature must be of a completely different sort from that which the actor's negligent conduct threatened and which would not have resulted had the operation of the force of nature not been extraordinary. * * * " (Emphasis added.)

The two criteria that must be met before an act of God may relieve the defendant of liability are conjunctive tests. Thus, the only circumstances under which the September 19-20 weather would relieve the government from responsibility for the continuing risk of fire is if the harm brought about by the weather was of a completely different nature than that which was foreseeable on August 6-7, to wit, damage from forest fire. Obviously, the harm which occurred is exactly that which would result from wind and weather acting upon fire.

Prosser on Torts, Revised Edition.

In this work, the author discusses intervening cause at length in Section 49, pages 266, *et seq.* Although the entire text is pertinent and cites a number of comparable cases, the following sections are particularly helpful:

"*Foreseeable Results of Unforeseeable Causes*

"Suppose that the defendant is negligent be-

cause his conduct threatens a result of a particular kind which will injure the plaintiff, and an intervening cause which could not be anticipated changes the situation, but ultimately produces the same result? The problem is well illustrated by a well-known federal case. The defendant failed to clean the residue out of an oil barge, tied to a dock, leaving it full of explosive gas. This was of course negligence, since fire or explosion, resulting in harm to any person in the vicinity, was to be anticipated from any one of several possible sources. A bolt of lightning struck the barge, exploded the gas, and injured workmen on the premises. The defendant was held liable. If it be assumed that the lightning was an unforeseeable intervening cause, still the result itself was to be anticipated, and the risk of it imposed upon the defendant the original duty to use proper care.

"In such a case, the result is within the scope of the defendant's negligence. His obligation to the plaintiff was to protect him against the risk of such an accident. It is only a slight extension of his responsibility to hold him liable when the danger he has created is realized through external factors which could not be anticipated. An instinctive feeling of justice leads to the conclusion that the defendant is morally responsible in such a case, and that the loss should fall upon him rather than upon the innocent plaintiff.

"Many cases have held the defendant liable where the result which was to be foreseen was brought about by causes that were unforeseeable: * * *." P. 278

Cases From Other Jurisdictions

Several cases from other jurisdictions support these rules.[9] The "well-known federal case" involving the oil barge, mentioned by Prosser, *supra,* is *Johnson v. Kosmos Portland Cement Company,* 64 F.2d 193 (6th Cir. 1933). In addition, we would particularly like to call the court's attention to the following cases involving fires:

Dippold v. Cathlamet Timber Company, 111 Ore. 199, 225 Pac. 202 (1924), involved a Washington forest fire which started in April, 1918, and, according to defendant, was all but extinguished by spring rains. A high wind in July spread the fire to plaintiff's property, causing the damage complained of. The Oregon court had no difficulty in finding that the April negligence contributed to the continuing risk of fire which eventuated in harm in July. At page 206, the Oregon court stated:

> "An act of God is an occurrence happening without the intervention or concurrence of any human agency. If it had appeared that lightning had struck and fired the timber, in consequence of

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[9] *Moore v. Townsend,* 76 Minn. 64, 78 N.W. 880 (1899); *Munsey v. Webb,* 231 U.S. 150, 34 S.Ct. 44, 58 L.Ed. 162 (1913); *Atkinson v. Chesapeake & Ohio Ry. Co.,* 47 W.Va. 633, 82 S.E., 502 (1914); *Mummaw v. Southwestern Telephone & Telegraph Company,* 208 S.W. 476 Mo. App. 1918); *American Coal Company v. DeWese,* 30 F.2d 349 (4th Cir. 1929); *Diamond Cattle Company v. Clark,* 52 Wyo. 265, 74 P.2d 857 (1937); *Bushnell v. Telluride Power Company,* 145 F.2d 950, 952 (10th Cir. 1944); *Gibson v. Garcia,* 96 Cal. App.2d 681, 216 P.2d 119 (1950), quoted and approved in *Danielson v. Pacific T. & T. Company,* 41 Wn.2d 268, 248 P.2d 568 (1952); *Riddle v. B. & O. R. Co.,* 137 W.Va. 733, 73 S.E.2d 793 (1952); *State v. Sims,* 97 S.E.2d 295 (W. Va. 1957); *Brewer v. United States,* 108 F.Supp. 889 (M.D. Ga. 1952); *Cachick v. United States,* 161 F. Supp. 15 (S.D. Ill. 1958).

which alone the logs had been consumed, that would have been an act of God. But here the evidence is that the fire was set out by the defendant for the purpose of burning its slashings, and one theory it advances is that this fire smoldered and ran underground for some time, after which it was fanned by the winds and caused the destruction of the plaintiffs' property. Whatever may be said of the effect of high winds, yet it is plainly not an act of God if it seizes upon a fire already started by human agency and causes the injury stated. *Rosenwald v. Oregon City Transp. Co.,* 84 Ore. 15, 163 Pac. 831, 164 Pac. 189."

The difficulty of contending that an extraordinary wind isolates the defendant's negligence from the injury is underscored in *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.,* 146 Minn. 430, 179 N.W. 45, 48 (1920). There, the fire started in August, 1918. On October 12 a 76 m.p.h. wind blew it out of a bog where it had long smoldered, and caused it to spread to plaintiff's property, a considerable distance away. The court, affirming a refusal to instruct on an act of God, said:

"We are of the opinion that the rule [act of God rule] does not apply to the facts in this case. There was a drought in Northern Minnesota throughout the summer and fall of 1918. It was protracted and severe. There was a high wind on October 12th. Towards evening and for a short time it reached a velocity of 76 miles an hour. The fire or fires which destroyed plaintiff's property had been burning a long time. Defendant was bound to know that, the greater the drought, the greater danger of the spread of a fire. Strong winds are not uncommon in Minnesota * * *.

> " * * * Neither the drought nor the wind would or could have desroyed plaintiff's property without the fire. * * * "

Precisely the same observation could and should be made in the case at bar. In the absence of fire in the 1600-acre area (which defendant's August 6-7th negligence caused) the September 19-20th weather would not have caused plaintiff's damage.

During the argument on appellant's motion to amend the findings and conclusions, the district judge concurred with this observation and said that it was so self-evident that it would not require a formal finding.

> "THE COURT: If you want me to make the finding, 'If there were no fire in the 1600-acre area on that date, fire could not have escaped from it,' in those words just like that, I will make such a finding, but I feel kind of silly in doing it.
>
> "MR. FERGUSON: Your Honor isn't reading the last portion, 'and plaintiffs would not have suffered the damage,' which is the key.
>
> "THE COURT: There again it is so self-evident. It is silly to state it. Nobody is suggesting that plaintiffs' damage came from any other source except the fire which escaped on this morning from the 1600-acre area. Now, if the Court is going to make findings of that kind, why, there is no end to what the findings could contain.
>
> "MR. FERGUSON: We haven't asked for a lot of findings, but we think it is important.
>
> "THE COURT: I am sure you do, and I am certainly prepared to make any finding that reasonably is necessary to be made. But to say that if

there is no fire existing fire can't escape, if there is no prisoner in the cell, he can't get out to harm the fellow down the corridor, it is just, in my opinion, plain foolishness to make a finding of that kind.

"MR. MARION: Your Honor, I am rather hesitant to suggest this as an alternative; 'That the wind, low humidity, and high temperature which occurred during the night of September 19 and 20, did not cause damage, and of themselves as independent forces did not damage the plaintiffs' property.'

"THE COURT: Well, that would be the same thing, of course. That would be the same statement of a simple self-evident fact that would be ridiculous to contain in a formal finding, and if that is all that is intended to be stated here, I don't see any point in stating it at all. It is perfectly apparent to everyone—or must be perfectly apparent to everyone, if there wasn't any fire you couldn't have burned anything." (R. 259-60)

Washington Law Re Act of God

This is the law in Washington and has been so recognized by this court in *Inland Power & Light Company v. Grieger,* 91 F.2d 811 (9th Cir. 1937). The case arose in the United States District Court for the Western District of Washington, Southern Division. It involved the flooding of plaintiff's lands on the Lewis River as a consequence of the concurrence of a condition contributed to by defendant's negligence acted upon by an extraordinary flood. On appeal, this court held that where the damage is the result of two concurring causes, one an act of God and the other a condition contributed

to by the defendant's antecedent negligence, the overwhelming weight of authority makes the defendant liable to the same extent as though all the damages had been caused by his negligence alone. The court relied on a number of its own cases, other federal cases, and upon *Howe v. West Seattle Land & Improvement Company,* 21 Wash. 594, 59 Pac. 495 (1899); *Goe v. Northern Pacific Railway Company,* 30 Wash. 654, 71 Pac. 182 (1903); and *Rice v. Puget Sound Traction, Light & Power Company,* 80 Wash. 47, 141 Pac. 191 (1914).

The rules may be brought into even closer focus by the following brief summaries of Washington cases.

In *Tope v. King County,* 189 Wash. 463, 65 P.2d 1283 (1937), the Washington Supreme Court reversed a trial court decision for defendant. The Supreme Court determined that defendant's negligence combined with an act of God (an unprecedented flood) to cause damage to plaintiff's land. Facing squarely the issue of liability of a negligent party under such circumstances, the court said, at pages 471-72:

> " * * * When two causes combine to produce an injury, both of which are, in their nature, proximate and contributory to the injury, one being a culpable negligent act of the defendant, and the other being an act of God for which neither party is responsible, then the defendant is liable for such loss as is caused by his own act concurring with the act of God, provided the loss would not have been sustained by plaintiff but for such negligence of the defendant. The burden of proof, however, is upon the defendant to show that the loss is due solely to an act of God. [Citing cases.]"

This holding was discussed and approved in *Blessing v. Camas Prairie Railroad Company,* 3 Wn.2d 266, 100 P.2d 416 (1940). See also *Topping v. Great Northern Railroad Company,* 81 Wash. 166, 142 Pac. 425 (1914).

In the case of *Teter v. Olympia Lodge,* 195 Wash. 185, 80 P.2d 547 (1938), and again in the *Blessing* case, *supra,* the court quoting 45 Corpus Juris 736 said:

> " ' * * * the fact that an injury was actually caused by a natural phenomenon of such unusual nature that it might be termed an 'act of God' will not excuse from liability where precautions which should have been taken to guard against occurrences which should have been expected were negligently omitted and such precautions would have prevented the injury.' * * * "

Observe the similarity between *Teter* and *Blessing* and the case at bar. Defendant's negligence in *Teter* was in failing for 40 days to do anything about the general risk of harm to persons within the scope of a 70-foot fire-damaged brick wall. This condition, acted upon by the wind, contributed to the damage. In *Blessing,* the railroad, long prior to the accident, created a condition of general harm by failing to construct a ditch through the cut where a derailment occurred. This condition, acted upon by a flood, contributed to the harm and made the defendant liable.

In *Galbraith v. Wheeler-Osgood Company,* 123 Wash. 229, 212 Pac. 174 (1923), the defendant contended that the escape of fire in a forested area was the direct result of a high wind which arose after the starting of

the fire. The Washington Supreme Court approved the verdict for plaintiff, saying:

> " * * * there was abundant evidence from which the jury could well find that the persons in charge of the fire did not exercise ordinary care and prudence in their management and care of the fire, and that this was the cause of the loss rather than the high wind. The question was therefore one for the jury, and as the question was fully and fairly submitted to them, we find no cause for interfering with their verdict."

In *Berglund v. Spokane County,* 4 Wn.2d 309, 103 P.2d 355 (1940), and again in *McLeod v. Grant County School District,* 42 Wn.2d 316, 255 P.2d 360 (1953), the court quotes and applies the following rule of law:

> " 'The courts are perfectly accurate in declaring that there can be no liability where the harm is unforeseeable, if 'forseeability' refers to the general type of harm sustained. It is literally true that there is no liability for damage that falls entirely outside the general threat of harm which made the conduct of the actor negligent. The sequence of events, of course, need not be forseeable. The manner in which the risk culminates in harm may be unusual, improbable and highly unexpectable, from the point of view of the actor at the time of his conduct. And yet, if the harm suffered falls within the general danger area, there may be liability, provided other requisites of legal causation are present.' Harper, Law of Torts, 14, § 7."

In the latter case the court, in addition, states:

> " * * * Whether foreseeability is being considered from the standpoint of negligence or proxi-

> mate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was expectable. Rather, the question is whether the actual harm fell within a general field of danger which should have been anticipated. * * * "

See also *Lewis v. Scott,* 154 Wash. Dec. 509, 341 P.2d 488 (1959).

The rule has particular applicability to the case at bar. As to each of the negligent acts and omissions of the government and of Mr. Floe and his subordinates, the general field of danger was that the Heckelville spot fire, if not contained and limited, suppressed and extinguished in the smallest possible area by the use of due care, might unite with some force or forces of nature arising at a later time to touch off a conflagration that would extend for miles. To insist that the precise nature and sequence of the concurring forces of nature be predictable is to take far too narrow a view of the matter.

The rule can be stated in another manner. The negligence of Mr. Floe and his subordinates stems from a duty imposed by law not to create an unreasonable risk that the plaintiffs and other persons may suffer property damage from a forest fire. In answering questions of proximate cause and intervening cause, it is sufficient if the defendant's negligence is in fact a cause of the harm and if the harm which occurs, as opposed to the sequence of events which concur to result in that harm, is foreseeable. Surely the government cannot be heard to say that the fire which occurred and the damages which it caused was not the very harm which was

risked by the negligence of Mr. Floe and his subordinates and, indeed, the prospect which made those acts and omissions negligent, as the district judge found. Can it now be argued that the government should be absolved from liability simply because the iterim sequence of events was unpredictable? Such a contention is wholly unwarranted.

For the foregoing reason it is clear that the fortuitous weather of September 19-20 does not exonerate the government from liability for its August 6-7th negligence.

CONCLUSION

This suit is important to the timber industry. It is equally important to the Government because the United States is in the timber industry. It owns, sells and raises more timber than anyone else and purposefully supplies raw materials to the manufacturers of forest products, both large and small. Private timber and public timber are intermingled, and what is good or bad for the private owner is equally good or bad for the Government.

Timber owners are going to see that their property is protected from fire and that an effective and conscientious organization is maintained in charge of that function. They expect, and are entitled to expect, that whoever takes charge in a given area will perform the job to standards commensurate with the responsibility assumed. By its own choice the United States Forest Service undertook the responsibility for fighting fire in the area here in question. If it had not done so,

then the State or some private company, or association of private companies, would have done so, just as they do in other areas. The Government must abide by the same rules that apply to its citizens.

It is sometimes difficult to erase from one's mind those barriers to liability of the sovereign which were erected through centuries of decrees and policy declarations. But it is now the law — and a good law — that the government and its employees are to be accountable for their negligence.

To give effect to this new law, the courts must take care to protect the rights of injured parties, and to see that no greater burden is placed upon citizens to obtain redress for the wrong doings of the Government than they would have in obtaining redress for wrongs committed by private persons. We earnestly believe that those aspects of this case are of far-reaching significance and deserving of this court's most careful consideration.

We asked this Court to reverse the judgment of the District Court and to direct the entry of judgment for appellant.

Respectfully submitted,

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BURROUGHS B. ANDERSON,
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APPENDIX A

WITNESS INDEX TO TYPEWRITTEN TRANSCRIPT OF TESTIMONY

APPENDIX B

LIST OF EXHIBITS

Exhibit No.	Description
1	June 14, 1910, quitclaim deed in chain of title to Section 30.
2	December 10, 1935, deed in chain of title to Section 30 filed for record in Clallam County on the following occasions to-wit: (a) December 23, 1935, under Auditor's Receiving No. 164459; (b) October 17, 1939, under Auditor's Receiving No. 186230; and (c) January 12, 1940, under Auditor's Receiving No. 187541.
3	December 28, 1918, warranty deed in the chain of title to the PAW right of way through Section 30.
4	1919, deed in the chain of title to the PAW right of way through Section 30.
5	November 30, 1946, deed in the chain of title to the PAW right of way through Section 30.
7	Contract SPC-557, dated March 31, 1937, between the government, as vendor, and Sol Duc Investment Company and PAW as vendees.
8	November 30, 1946, indenture whereby the United States Spruce Production Corporation assigned to the United States of America all of its interests as vendor under SPC-557, as amended (Exs. 7 and 9).

Exhibit No.	Description
9	Five supplemental contracts amending Contract SPC-557 (Ex. 7), dated respectively October 13, 1938, December 13, 1943, August 15, 1947, May 17, 1951, and August 21, 1952.
10	The Forest Service Railroad Stipulations dated July 18, 1938.
11	The Park Service Railroad Stipulations dated August 2, 1939.
12	The Forest Service Manual.
13	The Forest Service's Fire Control Handbook.
14	The 1951 Fire Suppression Plan.
15	Report on conditions of the PAW right of way (Form 399), dated November 23, 1936.
16	Letter dated November 2, 1937, from Mr. Floe to Supervisor, Olympic National Forest, re: condition of PAW right of way.
17	Report on condition of the PAW right of way (Form 399) dated November 22, 1937.
18	Report on condition of the PAW right of way (Form 399), dated November 15, 1938.
19	Letter dated July 30, 1946, from Mr. Floe to Supervisor, Olympic National Forest, re: the condition of PAW right of way.
20	Mr. Floe's November 20, 1945, letter to Mr. LeGear re: the condition of PAW right of way.
21	Mr. LeGear's January 24, 1946, letter to Mr. Floe re: the condition of PAW right of way.
22	The July 19, 1950, letter of Preston P. Macy,

Exhibit No.	Description
	Superintendent, Olympic National Park, to Harry LeGear of the Port Angeles Western Railroad Company.
23	January 17, 1951, memorandum from Preston P. Macy, Superintendent, Olympic National Park, to Regional Director, Region Four, National Park Service.
24	Cooperative Agreement between State of Washington and Forest Service in effect in 1951.
25	Not offered. See Ex. 80.
26	Port Angeles Western Fire Trespass Report submitted March 31, 1952.
27	Forest Service Forest Closure Notice covering the Soleduck River Area for the period July 2 through September 15, 1951, and related documents.
28	A summary of the State Forest Closures in the summer of 1951.
29	"Annual Fire Weather Report for Washington, Fire Weather District No. 3, Season 1951," published by the U. S. Department of Commerce, Weather Bureau Office at the Seattle-Tacoma Airport, Seattle 88, Washington.
30	U. S. Weather Bureau Climatological Data for the State of Washington, Volume LV, No. 4, for April, 1951.
31	U. S. Weather Bureau Climatological Data for the State of Washington, Volume LV, No. 5, for May, 1951.

Exhibit No.	Description
32	U. S. Weather Bureau Climatological Data for the State of Washington, Volume LV, No. 6, for June, 1951.
33	U. S. Weather Bureau Climatological Data for the State of Washington, Volume LV, No. 7, for July, 1951.
34	U. S. Weather Bureau Climatological Data for the State of Washington, Volume LV, No. 8, for August, 1951.
35	U. S. Weather Bureau Climatological Data for the State of Washington, Volume LV, No. 9, for September, 1951.
36	U. S. Weather Bureau Climatological Data for the State of Washington, Volume LV, No. 3, for the entire year.
37	U. S. Weather Bureau Form 1009-E, entitled "10-Day Fire Weather Record" for Snider Ranger Station.
38	U. S. Weather Bureau Form 1009-E, entitled "10-Day Fire Weather Record" for North Point Lookout Station.
39	U. S. Weather Bureau Form 1009-E, entitled "10-Day Fire Weather Record" for Beaver.
40	Hygrothermographs for Fibreboard Camp One for the period July 9, 1951, through September 23, 1951.
41	Hygrothermographs for Rayonier's Sappho Camp, for the period July 9, 1951, through September 23, 1951.

Exhibit No.	Description
42	Hygrothermographs for Rayonier's Hyas Ridge Weather Station, for the period July 9, 1951, through September 23, 1951.
43	Hygrothermographs for State Forest Warden's Headquarters at Beaver, Washington, for the period July 9, 1951, through September 23, 1951.
44	All fire weather forecasts broadcast by the United States Department of Commerce, Weather Bureau, Airport Station, at the Seattle-Tacoma Airport, for the period August 4, 1951, through September 20, 1951.
45	Rough telephone and radio log kept by District Ranger Floe and his wife at Snider Ranger Station on August 6, 1951.
46	The manuscript notes of L. J. Evans made subsequent to the events referred to which outline Mr. Evans' activities on August 6, 1951.
47	"Outline for Forks Fire Board of Review," pp. 1-5, inclusive, wherein Forest Service personnel set forth in chronological order the events of August 6-7, 1951.
48	"Individual Fire Report," on Forest Service Form 929, dated February 1, 1952, reporting this fire.
49	Rough organization chart for fire-fighting on August 7, 1951, prepared by District Ranger Floe and his subordinates. This appears in smooth form as a part of the "Outline for Board of Review" (Ex. 47).

Exhibit No.	Description
Ray. 50	Damages.
Ray. 51	Damages.
Ray. 52	Damages.
Ray. 53	Damages.
Ray. 54	Damages, Not Offered.
Ray. 55	Damages, Not Offered.
Ray. 56	Not Offered.
Ray. 57	Not Offered.
Ray. 58	Not Offered.
Ray. 59	Not Offered.
60	Woodcock diary for August and September, 1951, Forest Service Form 92-R.6.
61	Two Metzger maps pasted together as one map, covering parts of the fire area and environs.
62	Tracing of part of the 1600-acre area, showing 500-foot contours and identifying the 60-acre area and certain clearance data, etc.
63	Not Offered.
64	Diary of S. M. Floe for August, 1951, Forest Service Form 92-R.6.
65	"Individual Fire Report," Form FS-929, dated February 1, 1952, together with all forwarding correspondence and other writings relating thereto (Ex. 48).
66	29 yellow sheets, carbon copies, showing Fire Organization, August 7, 1951, to September 27, 1951.

Exhibit No.	Description
67	"Forest and Ranger District Dispatching Notes," Forest Service Form 89-R.6, consisting of 9 sheets, listing men and equipment in the Soleduck District. This is a part of Ex. 14.
68	Diary of L. J. Evans for August, 1951, Form 92-R.6.
69	Diary of L. J. Evans for September, 1951, Form 92-R.6.
70	Not offered.
71.	Not offered.
72	Daily Log and Diary—Dispatchers, Lookouts and other Semi-fixed Guards—Forest Service Form 934 of Edward Drake, covering the period June 18, 1951, through October 3, 1951.
73	Daily Log and Diary—Dispatchers, Lookouts and other Semi-fixed Guards—Forest Service Form 934 for W. S. Gamble, covering the period July 17, 1951, through September 20, 1951.
74	August 13, 1951, Government office memorandum addressed to District Ranger, Soleduck, from Field Supervisor, Olympic.
75	Daily Log and Diary—Dispatchers, Lookouts and other Semi-fixed Guards—Forest Service Form 934 of Edward Strum, covering the period June 23, 1951, through September 20, 1951.
76	Diary of Edward Drake, Forest Service Form 289, for August, 1951.

Exhibit No.	Description
77	Weather records of Snider Ranger Station, consisting of: (a) U. S. Department of Commerce, Weather Bureau, Form 1009-E, "10-Day Fire Weather Record" for Snider Ranger Station, covering the period August 1 to September 15, 1951 (Incomplete). This is a part of Ex. 37. (b) U. S. Department of Commerce, Weather Bureau, Form 1009 — climatological observations for August and September, 1951 (Incomplete). (c) U. S. Department of Commerce, Weather Bureau, Form 1009-E, "10-Day Fire Weather Record" for North Point Lookout Station (Incomplete). This is a part of Ex. 38.
78	Not offered.
79	Not offered.
80	"Fireman's Map 1950," bearing additional legend "Soleduck Ranger District, Olympic National Forest, Washington, 1949."
81	Burning Index Class Record, years 1951-52, Forest Service Form 84-R.6 (Revised April 1, 1946).
82	Not received in evidence.
83	Diary of John H. Leyh for September, 1951, Forest Service Form 92-R.6.
84	Not received in evidence.

Exhibit No.	Description
85	U. S. Department of Commerce, Weather Bureau, Form 1009-E, "10-Day Fire-Weather Record" for Lake Crescent Ranger Station, covering each of the following 10-day periods, to-wit: 10-day periods expiring August 10, August 20, August 31, September 10, September 21 and September 31, all of which are incomplete.
86	46 pages, more or less, of longhand and typewritten transcripts of daily weather forecasts received by radios at Snider Ranger Station during the period August 13 through September 12, 1951.
87	Not offered.
88	Four Forest Service Field Purchase Orders, entitled "Vendor's Invoice," on Forms AD-128C, dated August 11, 1951, showing equipment rental from Fibreboard Products, Inc., and P. G. Pearson.
89	Time slips, Forest Service Form 2-R.1, showing time spent by Fibreboard employees on PAW fire in August, 1951.
90	Time slips, Forest Service Form 2-R.1, showing time spent by Rayonier employees on PAW fire in August, 1951.
Govt. 91	Damages, not offered.
Govt. 92	Damages, not offered.
Govt. 93	Damages, not offered.
Govt. 94	Damages, not offered.
Govt. 95	Damages, not offered.

Exhibit No.	Description
Govt. 96	Damages, not offered.
Govt. 97	Damages, not offered.
Govt. 98	Damages, not offered.
Govt. 99	Damages, not offered.
Govt. 100	Damages, not offered.
Govt. 101	Certified consent of the Port Angeles Western Railroad, dated August 17, 1939, together with August 22, 1938, certified letter of the Acting Secretary, Department of Agriculture, to the Secretary of the Interior.
Govt. 102	Certified map showing right of way of PAW.
Govt. 103	Not offered.
Govt. 104	"Fire Weather Forecast Terminology," published by the U. S. Department of Commerce, Weather Bureau, dated 1948.
Govt. 105	Not offered.
Govt. 106	Forest Service Forms 1-R.6 entitled "Lookout Report," made by North Point Lookout, W. S. Gamble, covering two fires, one reported at 12:30 August 6, 1951, and the other at 1 p.m. August 6, 1951.
Govt. 107	Fire Plan — 1951 (Calawah-Hyas-Sitkum Area).
Govt. 108	Composite United States Geological Survey Map of Western Clallam County and environs on which there is traced the general outline of the entire burn area.
Govt. 109	Not offered.

Exhibit No.	Description
Govt. 110	Not received in evidence.
111	Van Orsdel map entitled "Origin of Fire, August 6 and 7, 1951."
112	Van Orsdel map entitled "1600-Acre Fire Map."
112-A	Fibreboard overlay to Ex. 112.
113	Van Orsdel map entitled "Vicinity Map of Landing No. 1."
114	Van Orsdel map entitled "Vicinity Map of Landing No. 1."
115	Handwritten transcripts of fire weather forecasts received at Snider.
116	Fire weather observer's daily memoranda for Snider Ranger Station.
117	Rough drafted fire control organization.
118	Board of Review proceedings — February 11, 1952, letter from C. A. Gustafson, Chief of the Forest Service Fire Control Division, to E. P. Cliff, Assistant Chief, N.F.A.
119	Board of Review proceedings — February 13, 1952, summary of discussions at Board of Fire Review on PAW fire.
120	Board of Review proceedings — March 18, 1952, letter from J. Herbert Stone to Chief of the Forest Service.
121	Board of Review proceedings — March 21, 1952, office memorandum from J. Herbert Stone to Acting Chief of Forest Service.

Exhibit No.	Description
122	Board of Review proceedings—"Comments on PAW Fire (Olympic)."
123	Board of Review proceedings — Comments on action.
124	Board of Review proceedings—Memoranda.
125	Rejected. Same as Ex. 46.
126	Rejected. Same as Ex. 45.
Ray. 127	Aerial photo-mosaic of entire Forks Fire burn area.
Ray. 128	Aerial photo-mosaic of the 1600-acre area.
Ray. 129	Aerial photo-mosaic entitled "Calawah Fire Area."
Ray. 130	Aerial photo-mosaic of vicinity of fire's origin.
Ray. 131	Aerial photo-mosaic of vicinity of fire's origin.
Ray. 132	Aerial photo-mosaic of vicinity of fire's origin.
Ray. 132-A	Aerial photo-mosaic of vicinity of fire's origin.
Ray. 133	Not offered.
Ray. 134	General map of Forks Fire burn area and vicinity.
Ray. 135	Reproduction survey map, 1948 and 1950.
Ray. 136	Reproduction survey map, 1948 and 1950.
Ray. 137	Reproduction survey map, 1948 and 1950.
Ray. 138	Reproduction survey map, 1948 and 1950.

Exhibit No.	Description
Ray. 139	Not offered.
Ray. 140	Rayonier certificates of clearance.
Ray. 141	"Slash Clearance Data—Forks Burn Area."
Ray. 142	Damages, not offered.
Ray. 143-A Ray. 143-B Ray. 143-C	Series of photographs of L-1
Ray. 144	Damages, not offered.
Ray. 145	Damages, not offered.
146	Witness Wayne Welch's personal memoranda book.
147	Not received in evidence.
148	Government slash map of burn area.
149	Map of a portion of Section 29, T-30-N, R-10-WWM.
149-A	A series of four photographs taken within the area shown in Ex. 149.
150	Western Fire Fighters' Manual.
151	Not received in evidence.
152	Quitclaim deed from PAW to U. S. Spruce Products Corporation.
153	Cross-complaint of U.S.A. against PAW in Cause No. 2956.
154	Damages, not offered.
155	Not offered.
156	Rejected.

Exhibit No.	Description
157	Rejected.
158	"Organization Plan for August 9-10-11 and 12, 1951."
159	Not offered.
160	Not offered.
161	Not offered.
162	Photograph of flat area near origin of fire.
163	Field purchase orders and voucher covering government's rental of Rayonier equipment.
164	Beaufort's Wind Scale.
165	Statement of Mrs. MacFarlane, state employee at Tyee.
166	State Forest Warden's radio log.
167	"Station Meteorological Summary," for Tatoosh Island.
168	Fuel moisture percentage prediction charts.
168-A	Fuel moisture percentage prediction charts.
169	Pages from Forest Service Manual.
170	Not received in evidence.
170-A	Rejected.
171	Washington Forest Fire Association, 44th Annual Report, 1951.
172	Rejected.
173	Baw Faw Peak Lookout weather data sheet.
174	Baw Faw Peak Lookout 10-day fire weather record.

Exhibit No.	Description
175	Weather Bureau's 16th Annual Fire Weather Report for Washington for Season 1939.
176	Fire Control Handbook.
177	Government's hypothetical question.
178-A	Simpson Logging Company calendar.
178-B	Photograph showing Northern Pacific right of way on Shelton-Bremerton route.
178-C	Photograph showing Northern Pacific right of way on Shelton-Bremerton route.
179	Answers to interrogatories.
180	April 30, 1951, letter from Forest Supervisor, Olympic National Forest, to Rayonier and May 5th reply thereto, requesting Forest Service pressure to maintain additional fire protection in Calawah area from Olympic Highway to Hyas Road junction.
181	Damages.
182	Weather records for 1951 season kept by J. O. F. Anderson at Hyas Ridge Weather Station.

APPENDIX C

EXHIBITS INDEX TO TYPEWRITTEN TRANSCRIPT OF TESTIMONY

Exhibit No.	*Identified*	*Offered*	*Rejected*	*Received*
1	II-365 R. 4	II-365		II-365
2	II-365 R. 4	II-365		II-365
3	II-365 R. 5	II-365		II-365
4	II-365 R. 6	II-365		II-365
5	II-365 R. 6	II-365		II-365
6	II-365 R. 6	II-365		II-365
7	II-365 R. 7	II-365		II-365
8	II-365 R. 8	II-365		II-365
9	II-365 R. 9	II-365		II-365
10	I-137 I-139 III-967 R. 8	I-138 III-967		I-140 III-967
11	I-137 I-139 III-967 R. 8	I-139 III-967		I-140 III-967

Exhibit No.	*Identified*	*Offered*	*Rejected*	*Received*
12	II-385 R. 9	II-386		II-386
13	II-388 R. 9	II-389		II-390
14	II-423 R. 9	II-425		II-426
15	II-460 R. 10	II-461		II-461
16	II-461 R. 10	II-461		II-461
17	II-461 R. 10	II-462		II-462
18	II-462 R. 10 R. 11	II-462		II-462
19	I-41 R. 11	I-44		I-44
20	I-39 R. 11	I-40		I-40
21	I-41 R. 11	I-41		I-41
22	I-46 R. 11	I-48		I-49
23	I-48 R. 11	I-50		I-50
24	II-401 R. 12	II-401		II-401
25	R. 12	Not Offered See Ex. 80		
26	II-667 R. 13 R. 17	II-667		II-671

ibit No.	*Identified*	*Offered*	*Rejected*	*Received*
27	I-58 R. 13	I-58		I-59
28	III-967 R. 13	III-967		III-968
29	II-501 R. 14	II-501		II-502
30	II-509 R. 14	II-509		II-509
31	II-509 R. 14	II-509		II-509
32	II-509 R. 14	II-509		II-509
33	II-509 R. 14	II-509		II-509
34	II-509 R. 14	II-509		II-509
35	II-509 R. 14	II-509		II-509
36	II-509 R. 14	II-509		II-509
36-A	VII-2154	VII-2156		VII-2159
37	III-968 R. 15	III-968		III-968
38	III-968 R. 15	III-968		III-968
39	III-968 R. 15	III-968		III-968
40	I-60 R. 15	I-60		I-60
41	1-60 R. 15	I-60		I-60

Exhibit No.	*Identified*	*Offered*	*Rejected*	*Received*
42	I-60 R. 15	I-60		I-60
43	I-60 R. 15	I-60		I-60
44	I-61 R. 15	I-61		I-61
45	III-830 R. 17	III-831		III-83
46	III-996 R. 17	III-996		III-99
47	II-682 R. 17	II-682		II-68
48	II-674 R. 18	II-673		II-67
49	III-968 R. 18	III-968		III-96
Ray. 50	R. 21	XIV-4596		
Ray. 51	XIV-4572 R. 21	XIV-4596		XIV-4
Ray. 52	XIV-4570 R. 21	XIV-4596		XIV-4
Ray. 53	XIV-4570 R. 21	XIV-4596		XIV-4
Ray. 54	R. 21	Not Offered		
Ray. 55	R. 21	Not Offered		
Ray. 56	R. 22	Not Offered		
Ray. 57	R. 22	Not Offered		
Ray. 58	R. 23	Not Offered		
Ray. 59	R. 23	Not Offered		

hibit No.	*Identified*	*Offered*	*Rejected*	*Received*
60	III-969	III-968 III-969		III-970
61	III-1003	III-1003		III-1003
62	IV-1214	IV-1214		IV-1214
63		Not Offered		
64	III-970	III-970		III-970
65	II-672 III-971	II-673 III-970 III-971		III-973
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67	III-973	III-973		III-973
68	III-996	III-996		III-996
69	III-996	III-996		III-996
70		Not Offered		
71		Not Offered		
72	V-1578	V-1578		V-1578
73	II-522	II-522		II-522
74	II-660 X-3261	II-660 X-3261		II-662 X-3262
75	III-973	III-973		III-974
76	V-1578	V-1578		V-1578
77	III-817	III-817		III-817
78		Not Offered		
79		Not Offered		
80	II-372	II-373		II-373
81	IV-1280	IV-1281		IV-1283
82	III-974	III-974		
83	III-974	III-974		III-974

Exhibit No.	*Identified*	*Offered*	*Rejected*	*Receive*
84	IV-1269	IV-1270		
85	VII-2269	VII-2269		VII-226
86	X-3262	X-3262		X-326
87		Not Offered		
88	III-975	III-975		III-97
89		III-975		
	X-3264	X-3264		X-326
90		X-3264		X-326
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Govt. 96		Not Offered		
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Govt. 108	III-952	III-952		III-9
Govt. 109		Not Offered		
Govt. 110	III-975	III-975		

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111	II-577	II-578		II-579
112	1-27	I-27		I-27
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113	III-849	III-849		III-851
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ay. 131	III-1031	III-1032		III-1032
ay. 132	I-206	I-207		I-207

Exhibit No.	*Identified*	*Offered*	*Rejected*	*Received*
Ray. 132-A	II-451	II-475		II-475
Ray. 133		Not Offered		
Ray. 134	VI-1886	VI-1887 XIII-4305		VI-1887 XIII-4305
Ray. 135	XIII-4305 XIV-4596	XIII-4305 XIV-4596		XIII-4305 XIV-4596
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Ray. 145		Not Offered		
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150	III-778	III-778		III-778

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151	III-783	III-784		
152	XIV-4617	XIV-4617		XIV-4617
153	III-789 III-790 XIV-4618	III-789 XIV-4617		III-879
154		Not Offered		
155		Not Offered		
156	X-3268	X-3268	X-3268	
157	X-3268	X-3268	X-3268	
158	IV-1082	IV-1082 IV-1083		 IV-1083
159		Not Offered		
160		Not Offered		
161		Not Offered		
162	V-1459	V-1460		V-1460
163	IV-1301	IV-1302		V-1303
164	V-1573	V-1573		V-1574
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171	VII-2251	VII-2257		VII-2257
172	X-3108	X-3108	X-3109	

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173	X-3350	X-3350		X-3350
174	X-3350	X-3350		X-3350
175	X-3372	X-3372		X-3372
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No. 16368

United States Court of Appeals
For the Ninth Circuit

RAYONIER INCORPORATED, a corporation, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

REPLY BRIEF OF APPELLANT RAYONIER INCORPORATED

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REPLY BRIEF OF APPELLANT RAYONIER INCORPORATED

FOREWORD

Part One

Without leave of court and without consulting or asking Rayonier's consent, the government has filed a single answering brief in this cause and in cause No. 16367, *Arnhold, et al. v. United States of America, et al.* Although the two suits have been consolidated for argument, they are entirely independent; they involve different parties; the respective appellants are represented by different counsel; the concepts, presentations and contentions of appellant Rayonier are materially different in several important respects from those of appellants Arnhold, et al.; and, because of the multiplicity of defendants in the Arnhold suit, there are necessarily some basic differences in issues.

Rayonier sued only the government. Its separate contentions are few and simple. The government could have

assisted this court measurably if it had answered them separately, as the rules contemplate.

By attempting to answer both opening briefs in a single answering brief, the government indiscriminately has mixed Rayonier's distinct contentions with those of Arnhold, et al., to accommodate the government's generalized answers to both.[1] Although there are a number of places in the government's brief where this occurs, Rayonier complains especially of the generalized charge on page 33 of the government's brief. The government knows that Rayonier does not contend that the district judge found in Rayonier's favor on the cause-in-fact issue and that it does not rely or "lay stress" on the following statement from the district judge's Memorandum Decision:

> " * * * negligence chargeable to the United States proximately contributed to the spread of the fire to the 1600-acre area * * *." (R. 203)

Indeed, Rayonier joins the government in assuming that probably the district judge inadvertently overlooked amending this portion of the Memorandum Decision following appellants' post-trial motions. Rayonier's arguments in connection with this statement are found in the portion of its brief which has nothing to do with cause-in-fact and is unmistakably labeled as and confined to "Concurring Acts of God" (R. Br. 59;

[1] The government's brief compounds the confusion by making a complete restatement of the case (G. Br. 6-21), including a burdensome repetition of many noncontroversial facts, and by quarreling about characterizations given and inferences drawn from certain facts (G. Br. 24-26, 38) even though, on the basis of these same facts, the district judge found the government negligent (R. 238; Am. F. XVI, R. 234-35; Con. IV, R. 237), thereby putting the matter to rest.

see also R. Br. 36-38 and especially 37). Nevertheless, the government's brief erroneously states:

> " * * * *appellants in both cases* lay stress (A. Br. pp. 14, 29, 38; R. Br. p. 60) on a statement in the court's memorandum opinion * * * that negligence chargeable to the United States did proximately contribute to the spread of the fire to the 1600-acre area (R. 203) * * *." (G. Br. 33) (Emphasis added)

This confusion of the causes has further led to an apparent contradiction. First, the government states that the district judge did not reach the issue of whether the September weather superseded prior governmental negligence (G. Br. 59). Then, the government states in its footnote 13 the following:

> " * * * Since the fire was contained within the 1600-acre area, the sole proximate cause of the damage would still have been that factor which occasioned its flare-up onto appellants' property—namely, the unexpected and unforeseeable adverse weather conditions. * * * " (G. Br. 60)

Relying on Finding XVIII (R. 235-36), which, as the government knows, applies exclusively to the Arnhold-PAW controversy, the government seems to contend that the district judge found that the sole proximate cause of Rayonier's damage was the unforeseeable weather of September 20th (G. Br. 21). Moreover, in the portion of its brief which discusses the September 19th-20th weather (G. Br. 50-55) the government makes no attempt, as clarity would seem to dictate, to explain that its discussion applies only to "mop-up" negligence, an issue stressed only by the Arnhold appellants.

This apparent self-contradiction is harmful to a proper appreciation of Rayonier's contentions and stems from the government's failure to distinguish and answer separately the specific contentions of each of the respective appellants.

In its entire brief the government has made no attempt to give separate consideration to Rayonier's contentions except in "Introduction" (2), p. 28, in section I.B.2.(b), pp. 39-43, and in the last paragraph on page 58. All other argument bearing on Rayonier's contentions is thrown in with argument focused on the Arnhold appellants' position. In addition, argument appears in section I.A.1, p. 29 and section I.B.(2d), pp. 36-39, which, by its terms, seems to include Rayonier but in fact does not.

The result is confusing and potentially prejudicial to Rayonier. We gave serious consideration to a motion to strike the answering brief but decided against it because of the delay and expense involved and because we hope that, with the aid of this reply brief and careful consideration, this court will be able to decide the Rayonier appeal on the presentation made and issues raised by this appellant.[2]

If, as the government suggests (G. Br. 21 and elsewhere), appellants' briefs *collectively* give an inaccurate picture or urge unmeritorious contentions, Rayonier does not wish to be placed in a position of having to justify or argue anything except what is contained

[2] The motion would have been on the ground that the rules contemplate separate answers to the separate contentions of each respective appellant and exclusion of repetitious and irrelevant matter. 9th Cir. Rules 8 and 18; Supreme Court of the United States Rule 40(3) and (5).

in its own presentation. Rayonier, having attempted to limit its opening brief to essential matters, should be entitled to protection from involuntary involvement in any "shotgun" exchange between the government and the Arnhold appellants. It should be entitled to the court's considered evaluations of its separate contentions in an atmosphere free of the confusion and incorrect generalizations incident to the other case.

Therefore, Rayonier urges this court to give special care and attention to the analysis made and the distinct questions presented by its opening brief.

Part Two

The government relies unwarrantedly upon *Rayonier Incorporated v. United States,* 225 F.2d 642 (9th Cir. 1955) (G. Br. 2, 3, 4, 60, 61). As the government admits (G. Br. 2, 5), that decision is a nullity, vacated in its entirety by the Supreme Court of the United States in *Rayonier Incorporated v. United States,* 352 U.S. 315 (1957). In any event, it is now wholly without precedential value in the Rayonier case because the district judge has stated in effect that if he has erred on the cause-in-fact issue, the next question to be decided is the "act of God" issue (R. 283; R. Br. 54-55). Under these circumstances the principles of intervening negligence of others expressed in 225 F.2d 642, 644, are not germane.

Part Three

In its restatement of the case and by challenging statements in Rayonier's opening brief (G. Br. 21-22, 24-26) the government has attempted to reopen dispute

over factual contentions which have been put to rest by the district judge's findings that the government was negligent in failing to act as "promptly, vigorously and continuously" as it "was required to do in the exercise of ordinary care" on August 6 and 7 (R. 238; Am. F. XVI, R. 235; Con. IV, R. 237). All of the disputed facts involve negligent acts and omissions clearly within these findings.

At the risk of engaging in needless dispute, Rayonier, by the following examples, wishes to correct any misimpression that may have been created by the government's resurrection of a version of the facts which has been discarded by the district judge's findings. We assume this risk because a proper undertanding of these facts will go a long way toward proving that the government negligently permitted the fire to spread to the 1600 acres. It will also foreclose the possibility that Rayonier's silence might lend credence to the government's implications that Rayonier has been inaccurate or has misrepresented.

Therefore, Rayonier hereby replies to paragraphs (a) through (e), pages 24-26 of the government's brief, in the following similarly designated paragraphs. When the government through the Forest Service, undertakes the duty to fight all fires and when its district ranger knows of the existence of fire in the hazardous circumstances existing August 6, 1951:

(a) The making of futile phone calls for help from a motionless locomotive when other ample sources of effective help are available for the asking is the equivalent of doing nothing.

(b) Urgent speed on attack and prompt, vigorous, continuous, thorough and effective action in reaching and putting out the fire were of first importance (R. 238). Floe had a duty to find out and could and should have known long before 1:30 p.m. that his reliance on the locomotive was misplaced (R. 176).

(c) Delay in taking effective action was negligence.

(d) The excuse that Evans properly left the critical Heckelville spot fire to direct more men to the fire is unsatisfactory at best. Floe knew where the fire was located; the men coming were grown men and could follow directions; the site of the fire was on and near the PAW tracks and easily accessible. Traffic control at that time would appear less essential than work and intelligent direction by the fire control officer *at the fire*.

(e) Two men pumping water on one fringe of the 60-acre fire during the night is not "appreciable" fire fighting (R. Br. 24-25) as required by the Forest Service Manual and other texts or by the experts and if there were men near the scene of the fire by 4:30 a.m., August 7, they were few in number. There is no dispute as to the fact that fire fighting did not commence until between 6 and 7 a.m. (R. 177; F. XI, R. 233) A large force of men and equipment should have been actively working at daybreak, as well as continuously throughout the night. In addition, Rayonier's brief was careful to point out on the same page from which the government quotes that there were a few men tending hoses on the *south* side after dark. The statement attributed to Rayonier was related to the locomotive crew pumping water on the *west* end of the fire. It did in fact stop work at 6 or 7 p.m.

On page 38 of its brief the government unfairly implies that appellants' witnesses were not experienced fire fighters with personal knowledge of the area and that the witnesses who were experienced fire fighters with personal knowledge of the area agreed with Floe that the fire should not have been fought on the night of August 6. The court found otherwise, night fire fighting being encompassed within the term "continuously" as used in Amended Finding XVI (R. 235). This is another example of the government's needless quibbling.

In its argument in support of Finding XVI (G. Br. 36-39) the government asserts that fire fighting commenced at 4:30 a.m., August 7 (G. Br. 38). This is needless disputation. The matter was put to rest by the district judge who found that the government was negligent in failing to commence fire fighting until between 6 and 7 a.m. (R. 177; F. XI, R. 233).

SUMMARY OF REPLY

The government had numerous opportunities and an abundance of men and equipment available to take more prompt, vigorous, continuous and thorough action during the initial stages of the fire (R. Br. 36-54). If it had done so, as the district judge found it should have, it was the unanimous opinion of the experts that such action could have completely controlled and extinguished the fire at an early stage and prevented its spread into the 1600 acres on the afternoon of August 7. Six other spot fires were so controlled and extinguished. The district judge, as a layman, should have accepted this unanimous expert opinion and he failed to do so because he erroneously thought that Rayonier was required to present witnesses who concurred as to details. The government's answer (G. Br. 39-43) fails to meet this contention, for it does little more than attack the qualifications of the experts and their judgment on an issue (negligence) which the district judge decided in favor of Rayonier. No pertinent reason is supplied and no authority is cited to challenge Rayonier's conclusion that the district judge failed to give proper weight to the unanimous opinions of the same experts on the cause-in-fact issue.

The government makes an even less serious attempt to answer the second part of Rayonier's opening brief (R. Br. 54-72) on proximate and intervening cause. Its abstention from this argument (G. Br. 55-60) is based on the flimsy premise that the government considers the issue irrelevant, because it is conditioned on this court's reversal of the district judge on cause-in-fact.

Contrast this with the government's precautionary contention that it has no duty to maintain the railroad right of way (G. Br. 60-68) which is expressly conditioned on the chance that this court might hold adversely to the government on cause-in-fact as to its negligent maintenance of the right of way (G. Br. 27).

This inconsistency has led Rayonier to conclude, as it feels this court shall, that the second portion of Rayonier's brief is unanswerable.

ARGUMENT IN REPLY

Cause-in-Fact

The government attacks the qualifications of appellants' witnesses, Jones, Schaeffer and Jacobson, and their judgment as to what a prudent forest ranger would have done (G. Br. 41-42).

The government's attack on these witnesses is both unfair and unmeritorious. It is unfair because of the eminent stature of these distinguished gentlemen in their profession. The record of their unimpeachable qualifications and judgment follows: Cowan, Tr. VII 2305; Jones, Tr. VIII 2534; Schaeffer, Tr. VIII 2619; and Jacobson, Tr. IX 3034. It is unmeritorious because it disregards the fact that the district judge, contrary to the government's implications, did not discount or disbelieve any of these experts. All of the district judge's findings and conclusions on negligence were premised on the testimony of the very same witnesses (R. 238; Am. F. XVI, R. 234-35; Con. IV, R. 237).

These same experts testified that if the government had employed the fully and readily available fire fighting forces according to the standard of care which the district judge found to be applicable (R. 238), the fire could have been completely extinguished in the spot-fire stage (as the other six spot fires were) and, in any event, completely controlled and suppressed in sixty acres or less, either during the night of August 6-7 or during the forenoon of August 7 (R. Br. 36-54, especially 41-43 and 46-50). The government admits "several witnesses" so testified (G. Br. 39). Some of these

"several" were government experts relying on the Forest Service Fire Control Handbook and on the Forest Service Manual (R. Br. 41-42, 46-49). Thus, *all* the experts agreed that if the government had not been negligent, the fire would not then have spread into the 1600 acres (R. Br. 36-54, especially 41-43 and 46-50), No witness testified that the exercise of ordinary care would have been insufficient, inadequate or incapable of completely extinguishing the spot fire or of completely controlling and suppressing the fire during the afternoon or night of August 6 or the morning of August 7 (R. Br. 39, 53).

Therefore, the government's attack on the credibility and judgment of the experts begs the question. Under these circumstances, there has to be some other explanation for the district judge's holding that Rayonier failed to prove by a preponderance of the evidence that the government's negligence was a cause-in-fact of its damage.

The real question is whether the district judge erroneously required of Rayonier too strict a burden of proof (R. Br. 46, 50-54).

In support of the higher burden of proof the government argues that the district court was not compelled to accept opinion evidence as demonstrating that the use of a particular number of men would have controlled the fire (G. Br. 41).

This, too, begs the question. The point is: To require an injured party to prove "when" and "where" the fire could have been stopped and how many men and

how much equipment would have been required to do so at any given time or place is to force an impossible burden of proof upon the plaintiff, contrary to law and in frustration of substantial justice. Forest fire fighting experts simply do not often agree with unanimity on such detail. However, this should not obscure the fact that these experts—the government's as well as appellants'—agreed on the general proposition that the fire could have been completely extinguished as a spot fire or completely controlled and suppressed within the sixty acres during the remaining hours of August 6 and the morning hours of August 7, if the government continuously had used "ordinary and reasonable care" as broadly defined (R. 238; R. Br. 36-54, especially 41-43 and 46-50).

This is a situation where the district judge used the proper standard of proof in evaluating the expert testimony on standard of care (R. 238) and on negligence (Am. F. XVI, R. 234-35; Con. IV, R. 237), and then, in evaluating the testimony of the same witnesses on cause-in-fact, required of Rayonier a higher standard of proof, requiring it to show by a preponderance of the evidence that the fire could have been suppressed at an *exact* place at a *specific* time (Am. F. XVI, R. 235). The government would carry this to an absurdity by imposing an even higher standard requiring Rayonier to show by a preponderance of the evidence that the fire could have been suppressed at an exact place at a specific time by a certain number of men and a certain quanitity of material (G. Br. 39).

This is not a situation, as the government suggests,

where Rayonier has *assumed* " * * * that the district court found that the Forest Service was negligent in not employing that number of men mentioned in one or another of the estimates" (G. Br. 39). On the contrary, Rayonier does not *assume* anything. It relies on the record which speaks for itself and reveals that the district judge, after reviewing the expert testimony, established that "ordinary and reasonable care requires urgent speed, vigorous attack and great thoroughness in reaching and putting out fire in the forest" (R. 238). He also found that the district ranger was negligent because he failed "expeditiously and fully to perform such duty" (R. 240, 243); and "failed to act as promptly, vigorously and continuously" as he was "required to do" (Am. F. XVI, R. 234-35). This encompassed the widest range of substandard conduct during the entire period from noon time August 6 through the night of August 6-7 until 2:30 p.m., August 7.

And this is not a situation, as the government contends, where "it was for the trier of the fact to determine what weight should be attached to the different opinions expressed by witnesses of varying qualifications" (G. Br. 43) because these witnesses did not express a "different" opinion on the true point in issue, *viz.*: Could the fire have been suppressed by ordinary care in its initial stages? On that issue there was unanimity.

Finally, Rayonier wishes to emphasize again the fact that not only did the expert witnesses agree that the fire could have been extinguished at the spot-fire stage, but it is an uncontroverted fact that six other

spot fires, started at approximately the same time under the same general conditions, were so *extinguished*. The only possible explanation of the failure of the Forest Service to extinguish that seventh spot fire is its failure to take the "prompt, vigorous" action which the trial judge found it was bound to use. Floe did not even make a fair try. He was trying to make the PAW pick up the check.

Continuing Risk and Intervening, Superseding and Concurring Cause

Part One

The government has declined to answer on the merits Rayonier's argument on proximate and intervening cause (R. Br. 33, 54-72), on the ground that it "rests upon a state of facts other than that found" (G. Br. 60).

The government knows or should know full well that Rayonier's argument on proximate and intervening cause (R. Br. Part. II, 54-72) rests on the assumption that Rayonier's argument on cause-in-fact (R. Br. Part I, 36-54) will be sustained by this court.[3] A holding by this court that the district judge erred in the last two sentences of Amended Finding XVI (R. 235) will require a decision on the issues of proximate and intervening cause. In this light, argument on proxi-

[3] The government should have answered this issue in a manner similar to its argument on the existence of a duty to maintain the PAW right of way (G. Br. 60 *et seq.*) which "rests upon a state of facts other than that found" *viz.*, the assumption that appellants Arnhold *et al.*, may prevail on the cause-in-fact issue as it relates to negligent maintenance of government land, including the right of way. *The government's failure to answer Rayonier's argument on the merits when it has answered Arnhold. et al.'s argument on the merits strongly suggests that the government considered Rayonier's argument to be unanswerable.*

mate and intervening cause is relevant, and may become controlling.

Because the government's treatment of this matter leaves totally unanswered Rayonier's argument on proximate and intervening cause, the court's special attention is invited to Part II of Rayonier's opening brief (R. Br. 54-72) where the matter is fully discussed.[4]

Part Two

Nevertheless, statements in the government's brief (G. Br. 57-60) indicate an area of concurrence as between the government and Rayonier on the background of this important aspect of the case which should be brought to the court's attention at this point. Rayonier concurs with the government's contention that the district judge found it unnecessary to consider whether the September 20th weather was an act of God (G. Br. 59). Rayonier accepts the government's premise that the district judge did not reach this issue because, under his analysis of the case, the government's liability already had been foreclosed by the last two sentences of Amended Finding XVI (R. 235) that cause-in-fact had not been established.

However, the statements from the Memorandum Decision quoted in Rayonier's opening brief (R. Br. 59-60; R. 201-02, 203, 239) show that the district judge thought that if he were in error on cause-in-fact, the law in Washington was such that the government's liability might then turn on a question of fact, to-wit:

[4] See also Part One of Foreword, pp. 3-4, *supra*, part of which relates to the government's failure to answer this argument.

Whether the September 20th weather was an unforeseeable "act of God," and that the government might be exonerated from liability for its November 6th-7th negligence, if it were decided that the weather was in fact an unforeseeable "act of God."

In this he erred again because *this is not the law in Washington* (R. Br. 54-72).[5]

Rayonier realizes that this is not the same as alleging "error," as such, because the district judge did not make a specific ruling on this issue (R. 201; G. Br. 59). However, the district judge stated that if cause-in-fact had been found adversely to the government, he would have been required to decide whether or not the September 20th weather was an "act of God, as that term is meant in the law" (R. 201). This clearly indicates that he believed erroneously that "unforeseeable" weather could absolve the government from liability for its negligence and that he erroneously misconceived the term "concurrence" in this connection (R. Br. 60).

Therefore, this court not only should sustain Rayonier's contentions on the issue of cause-in-fact, but also should hold as a matter of law that the September 20th weather, irrespective of whether it is an "act of God," cannot exonerate the government from liability for its August 6th-7th negligence.

---

[5] See, however, the district judge's statement of Washington law in the Memorandum Opinion (R. 180). This indicates that he was in general concurrence with Rayonier's views of the law on this issue, but intended erroneously to apply the rules to require that the negligence concur simultaneously with the act of God (R. Br. 60).

CONCLUSION

The government's initial negligence on August 6 clearly permitted a fire to exist which could have and should have been completely extinguished in the spot-fire stage, just as all the other nearby spot fires were extinguished that day. Its further negligence on August 6 and 7 permitted the existence and spread of the fire which could have and should have been completely controlled, suppressed and mopped up at any of various stages before 2:30 p.m., August 7. This further negligence permitted the fire to exist in a larger area, in more difficult terrain and increased its exposure timewise to the risk of being spread further by wind.

If there had not been any initial negligence there would have been no fire in the 60 acres on August 7 for the wind to spread. If there had not been any *further* August 6th-7th negligence, the fire, if any, that may have existed at 2:30 p.m., August 7, would have been so completely controlled, suppressed and mopped up that the wind would not have spread it. In either such event, the fire could not have spread to the 1600-acres. Therefore, the government's negligence was a cause-in-fact of the existence of fire in the 1600 acres. All of the witnesses so testified and the district judge erred in failing to accord proper weight to this general concurrence of expert opinion.

The fire in the 1600 acres, thus negligently caused, was a continuing risk of harm until it was acted upon by the wind during the night of September 19th-20th and thus directly and proximately caused the damage to appellant when the September 19th-20th wind car-

ried the fire out of the 1600 acres into the surrounding property, some of which was Rayonier's.

The government's August 6th-7th negligence was the proximate cause of Rayonier's damage because: The harm that Rayonier suffered was within the scope of the general type of harm, a risk of which was created and increased by said negligence; the continuing risk of that harm did not expire prior to September 19th-20th; and the government's subsequent mop-up operations, even if prudent, did not insulate the government from liability.

The fortuitous weather of September 19th-20th cannot exonerate the government from liability for its August 6th-7th negligence because the September 19th-20th weather, acting alone, did not cause Rayonier's damage and because, as a matter of law, when a person's negligence has created a continuing risk which eventually is acted upon by a force of nature, even if that force is extraordinary, the person who has created the risk will be liable unless the harm suffered is of a kind entirely different from and outside the scope of the risk which made the defendant's conduct negligent.

It is respectfully submitted that the government is liable and this court should direct entry of judgment for Rayonier.

Respectfully submitted,

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Rayonier Incorporated

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RAYONIER INCORPORATED, a Delaware corporation, Appellants, vs. UNITED STATES OF AMERICA, Appellee.	NO. 16368 ERRATUM IN REPLY BRIEF OF APPELLANT RAYONIER INCORPORATED

On page 17, line 3, strike the word "November" and substitute in lieu thereof the word "August."

DATED this 22nd day of March, 1960.

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,

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No. 16368

United States Court of Appeals
For the Ninth Circuit

RAYONIER INCORPORATED, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S MEMORANDUM IN ANSWER TO APPELLEE'S PETITION FOR REHEARING

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THE ARGUS PRESS, SEATTLE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S MEMORANDUM IN ANSWER TO APPELLEE'S PETITION FOR REHEARING

TO THE HONORABLE WALTER L. POPE, CALVERT MAGRUDER AND CHARLES M. MERRILL, JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

This Memorandum is filed in response to the invitation of the Court.

There Is No Intra-Circuit Conflict

The Government suggests (Pet. p. 1):

> "that these cases should be reheard *en banc*, primarily because of the conflict between certain critical holdings in this Court's opinion and rulings on the same issue in an earlier appeal of these cases."[1]

[1] The earlier appeals were *Rayonier Incorporated v. United States*, 225 F.2d 642 (9th Cir. 1955); *Arnhold, et al. v. United States, et al.*, 225 F.2d 650 (9th Cir. 1955).

The Government's premise is false because the judgment and opinion in the earlier appeals is a nullity and without legal significance. No conflict is presented.

In our appeal to the United States Supreme Court from the 1955 decision of this Court, we discussed and presented to the Supreme Court all of the matters in the first appeal opinion which the Government now says present an "intra-circuit" conflict or disagreement. In our brief to the Supreme Court we then said (p. 84):

> "Whether this Court does or does not reverse the courts below on the basic question of immunity of the Government from liability for acts of public firemen — and we believe it will, it is of primary importance that this Court correct the gross error of the Court of Appeals in its misconstruction of the amended complaint. Not only has the Court of Appeals greatly prejudiced petitioner, but we earnestly believe the opinion to be bad law which should not be permitted to stand with the precedental authority attaching to a case which is reviewed by the Supreme Court of the United States."

It was because of our argument that the Supreme Court said:[2]

> " * * * Furthermore, it has been strongly contended here that the Court of Appeals improperly interpreted certain allegations in the complaints and as a result of such misinterpretations incorrectly applied Washington law in passing on the sufficiency of these allegations. In view of the circumstances, we think it proper to *vacate both judg-*

[2] *Rayonier Incorporated v. United States,* 352 U.S. 315, at pp. 320, 321.

> *ments in their entirety* so that the District Court may consider the complaints anew, in their present form or as they may be amended, *wholly free* to determine their sufficiency * * * " (Italics supplied)

It is not common for the Supreme Court to specify that a judgment is vacated *in its entirety* nor to remand the case to the District Court *wholly free* to act. The Supreme Court's language was no happenstance or carelessly composed statement.

Our exceptions to the Court of Appeals opinion were properly before the Supreme Court to rule on, and had that Court intended that the Court of Appeals opinion be other than a nullity it would have ruled specifically on our exceptions. Furthermore, when the Supreme Court remanded the case to the District Court "wholly free" to determine the sufficiency of the complaints, it could mean only that the Court of Appeals opinion was to be completely disregarded and treated as of no effect whatever. It follows that this Court is equally free to disregard the prior opinion.

The section of our brief to the Supreme Court last referred to was not answered or discussed by the Government in its answering brief and, tacitly at least, was confessed by the Government. We do not deem it appropriate here to repeat our presentation to the Supreme Court on these matters, but if this Court wishes us to do so, we will be glad to furnish it with copies of the Supreme Court briefs.

This Court should note that since the Supreme Court decision in these cases on January 28, 1957, the Court

of Appeals decision in the first appeal has not been cited by any court as authority for any proposition, so far as we can ascertain, and could not be cited with propriety because it was vacated in its entirety.

The Washington Law Is As Assumed By This Court

In its opinion filed in these cases October 26, 1960, this Court said (Slip Op. p. 4):

> "Though we have been referred to no Washington case on the point, we may assume the Washing law to be laid down in *Palsgraf v. Long Island RR Co.,* 248 N.Y. 339, 162 N.E. 99 (1928), and In Restatement, Torts, § 281(b) (1934) * * * "

The *Palsgraf* case has been quoted and cited with approval a number of times by the Washington Supreme Court, *e.g., Freeman v. Navarre,* 47 Wn.2d 760, 289 P. 2d 1015 (1955); *Sitarek v. Montgomery,* 32 Wn.2d 794, 203 P.2d 1062 (1949); *Kennett v. Yates,* 41 Wn.2d 558, 250 P.2d 962 (1952).

Restatement, Torts, § 281, is cited with approval in *McFarland v. Commercial Boiler Works,* 10 Wn.2d 81, 116 P.2d 288 (1941). This Court has cited § 281 with approval in a case appealed from the United States District Court for the Western District of Washington. See *States S.S. Co. v. Rothschild International Stevedoring Co.,* 205 F.2d 253 (9th Cir. 1953).

The "New York" Rule Is Not The Law in Washington

The rule peculiar to decisions of the State of New York (and Pennsylvania to a limited extent) referred to (Slip Op. p. 5), to the effect that direct and immedi-

ate connection between the negligent act and the damage is necessary for liability, is not the law in Washington, and the fact that the fire, negligently burning, may have passed over intervening lands before reaching appellant's property does not immunize the Government from liability for its negligence. *Conrad v. Cascade Timber Co.,* 166 Wash. 369, 7 P.2d 19 (1932).

Proximate Cause Was Proved

The respondent argues that the negligence of Government employees was not a proximate cause of appellant's damage.

We call attention to Part II of this appellant's Opening Brief, pages 54 to 72. The Government's Answering Brief did not answer that part of our Opening Brief and, in fact, during the course of the oral argument before this Court on May 10, 1960, it was rather clearly conceded that there is no quarrel as to the correctness of the applicable principles of law as stated in Part II of our Opening Brief.

"Foreseeability" is the test of proximate cause in Washington, and this Court accurately points out (Slip Op., pp. 4, 5) that appellant's damage was foreseeable as within the risk of harm created by the Government's negligence.

This Court very properly stated (Slip Op., p. 4) that the negligence found by the trial judge was not negligence in the abstract. The record shows uncontroverted facts and the unanimous opinion of the experts for the Government as well as of the experts for appellant, that the fire could have and would have been suppressed

in its initial stages by prompt, vigorous and continuous action which Government employees negligently failed to take. There is nothing in the record upon which the District Court could, as a matter of law, find that "It has not been established by a preponderance of the evidence that had such negligence not existed the fire would have been contained in the 60-acre area, or that there is any causal relationship between that negligence and the ultimate existence of fire in the 1600-acre area." For fuller discussion of this point, we refer the Court to pages 36 to 54 of our Opening Brief.

Even if we assume, arguendo, as the Government contends, that Amended Finding XVI is susceptible to interpretation that it was a finding of no proximate cause, that contention is answered in toto by the record of undisputed facts, the unanimous opinion of experts and the district court's findings of negligence and foreseeability. The record is tantamount to and requires findings that: (1) had the Forest Service employees not been negligent the fire would have been extinguished in its initial stages, and (2) had the fire been so extinguished it would not have spread to the 1600 acres and would not have damaged appellant. The burden of proof was fully met by appellant. There simply cannot be any other conclusion under the facts. This Court correctly held (Slip Op. p. 6) that any other conclusion would be speculative. Therefore this Court properly directed entry of judgment for appellant. See cases cited at page 53 of our Opening Brief.

Conclusion

The appellee's petition for rehearing should be denied. There is no intra-circuit conflict. There is nothing in this Court's opinion filed October 26, 1960 that is contrary to Washington law. Nothing is presented in the petition that was not or could not have been presented by appellee in its brief or in its argument. No novel questions are involved.

Respectfully submitted,

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No. 16394

United States
COURT OF APPEALS
for the Ninth Circuit

MAYFLOWER INSURANCE EXCHANGE,

Appellant,

vs.

ROBERT DEAN GILMONT, ROSE MARIE GILMONT and RONALD A. WATSON, Guardian ad Litem for Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor and Norman I. Gilmont, a minor,

Appellees.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE WILLIAM G. EAST, District Judge.

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No. 16394

United States
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Appellees.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE WILLIAM G. EAST, District Judge.

BASIS OF JURISDICTION

This action was commenced in the United States District Court for the District of Oregon by appellant pursuant to the remedy created by 28 U.S.C.A. 2201, 2202, for a declaration of the rights and liabilities of the parties arising out of a policy of insurance issued

by appellant to defendant McKinzie as of April 16, 1957. The appellees Gilmont are persons who were injured in an automobile accident on June 8, 1957, which involved an automobile in which they were riding and an automobile being operated by defendant McKinzie.

The jurisdiction of the District Court was based on diversity of citizenship under the provisions of 28 U.S.C.A. 1332 in that appellant is an unincorporated association organized under the laws of the State of Washington as a reciprocal or inter-insurance exchange and all of the defendants are citizens of the State of Oregon. The amount in controversy, exclusive of interest and costs, exceeds $3,000.00 (R. 19).

Appellant has appealed from the final judgment of the District Court (R. 56).

This court acquired jurisdiction under the provisions of 28 U.S.C.A. 1291, 1294.

STATEMENT OF THE CASE

The appellant, Mayflower Insurance Exchange, an unincorporated association organized under the laws of the State of Washington as a reciprocal or inter-insurance exchange and duly licensed to transact an insurance business in the State of Oregon, brought this action pursuant to the Federal Declaratory Judgment Act (28 U.S.C.A. 2201, 2202) to determine what liabilities, if any, existed by virtue of an automobile liability policy issued by appellant to the defendant McKinzie.

The policy was issued as of April 16, 1957, based upon an application taken on that date by appellant's local soliciting agent at Portland, Oregon. On June 8, 1957, the defendant McKinzie, while driving his automobile, collided with an automobile being driven by appellee Robert Dean Gilmont, in which car appellees Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman I. Gilmont, were riding as passengers.

The appellant contends that the policy was void *ab initio* because of specific false and fraudulent representations which were made by defendant McKinzie at the time he applied for the policy.

All of the defendants, including defendant McKinzie, were duly served with summons and complaint by the U. S. Marshal within the jurisdiction of the United States District Court for the District of Oregon. While the defendant McKinzie never made any appearance in this action, nonetheless his deposition was taken upon appellant's motion and at that time the attorney for the appellees was present and conducted a thorough cross examination of defendant McKinzie.

The appellees filed an amended answer in which a variety of defenses were set up. The main defenses set forth in the amended answer of appellees Gilmont were based upon theories of estoppel, waiver and laches. During the course of the trial these defenses were withdrawn from the case by the court and at the close of the trial the case was submitted to the jury on instructions that

its verdict must be in favor of appellees if it found that appellant had failed to prove all the elements of actionable fraud entitling recission, or that appellant acted negligently in taking the application from defendant McKinzie.

The jury returned its verdict in favor of appellees Gilmont (R. 44). Subsequent to the filing of the verdict and prior to the entry of judgment an order of default was entered against defendant McKinzie (R. 49).

Judgment was entered for appellees Gilmont declaring the policy of insurance to be in full force and effect and binding on the appellant so as to provide coverage for the accident of June 8, 1957 (R. 52).

Appellant's motion for judgment n.o.v., or in the alternative for a new trial, was denied and appellant thereafter filed its notice of appeal (R. 56).

SPECIFICATION OF ERRORS

1. The trial court erred in denying appellant's motion for a directed verdict.

This motion was based on the grounds that appellant had conclusively proved all the elements of fraud entitling it to rescind the insurance policy, that there was no evidence of any sort or nature to the contrary, that there was no evidence of any sort or nature which would justify a verdict in favor of appellees and against appellant, and that there were no issues of any sort or nature to be submitted to the jury. (R. 268-272, 278-279)

2. The trial court erred in denying appellant's motion to set aside the verdict heretofore received and filed and for the entry of judgment in favor of appellant n.o.v.

This motion was based on the grounds that there was no evidence that appellant was negligent in completing the application for insurance from defendant McKinzie, that there was no evidence which would authorize a jury to return a verdict against appellant, and that the evidence was uncontradicted and conclusively proved that defendant McKinzie intentionally made a false and material representation for the purpose of inducing the appellant to issue its automobile policy and that appellant had acted in reliance thereon and had suffered injury (R. 44-45).

3. The trial court erred in denying appellant's motion for a new trial.

This motion was based on the grounds that the verdict was against an overwhelming weight of evidence, was based upon the court's instruction that they could find for defendant on either one of two theories, one of which would not support a recovery under the facts, that no judgment could be rendered in favor of appellees since they had no greater right than defendant McKinzie, who had defaulted, that there is no evidence from which the jury could find that appellant was negligent in completing the application for insurance, and that the evidence conclusively proved that appellant was entitled to a verdict on the grounds of fraudulent representations on the part of defendant McKinzie (R. 44-46).

4. The trial court erred in failing to give appellant's requested instruction No. 2 reading as follows:

> "Defendants Gilmont have contended and set up by way of defense to this action that plaintiff was negligent in obtaining and completing the application for insurance from defendant Arthur Allen McKinzie. You are instructed that there is no evidence from which you could find that plaintiff was negligent in obtaining and completing the application for insurance from defendant McKinzie and you will therefore completely disregard this contention and defense in determining this case." (R. 43)

and appellant duly made its objection thereto as follows:

> "We object and except to the failure of the Court to give the plaintiff's requested instructions.
>
> The Court: Which one is that?
>
> Mr. Vosburg: Your Honor, I don't believe you have given any of ours.
>
> The Court: Well, there is one I gave part of, but not in your form, Number 1, defendant failed to truthfully disclose his answers to the questions. I think that was covered. I didn't give it in your form. But I think it was covered. Number 2 was taken from the jury . . . You conceded that number 10 was covered by defendants' instruction. (266) And I refused to give defendants' number 11. You may have your objections.
>
> Mr. Vosburg: May I call your Honor's attention when you say they were taken from the jury, our instructions, I think 2, 3, 4 and 5, those are the ones which your Honor has ruled here during the course of argument there was no evidence to sustain the submission to the jury. I don't think your Honor specifically has withdrawn them from the jury except by inference, and the reason I am calling this to your Honor's attention is, there has

been introduced as evidence, and I assume will be submitted to the jury, this amended and supplemental answer of the defendants which sets out all of these other so-called alleged defenses, which you have withdrawn. I just call that to your Honor's attention. The jury may be misled." (R. 299-300)

5. The trial court erred in instructing the jury as follows:

"Now members of the jury, there is a second issue which is raised by the contention of the defendants Gilmont as to whether or not the agent at the time he took the answers from McKinzie acted with ordinary, reasonable care for the protection of his own company, and in that connection you are charged that the defendants Gilmont have charged that the plaintiff, acting through the agent who took the application, was careless and negligent in obtaining and completing the application of insurance from McKinzie.

"You are instructed, members of the jury, that negligence as ordinarily defined, is a failure to do that which an ordinary, reasonable prudent person would do under the same or similar circumstances, or doing that which an ordinarily reasonable prudent person would not do under the same or similar circumstances.

"Therefore, if you should find from the evidence that the plaintiff, acting through its agent, was careless and did not act as a reasonably prudent person, being an insurance company, in obtaining the answers from McKinzie while filling out the application for insurance by Mr. McKinzie, and thereby blindly or recklessly put down defendant's answers to the question without reasonable credulence, you should then find that the plaintiff is not entitled to be relieved of obligation under its policy because then through such action

and conduct he would have been, become a party to the transaction.

"However, if you find that the plaintiff's agent while taking down the answers acted reasonably in accepting the answers given to him by McKinzie, then McKinzie is bound by his own doings as you shall find them from all of the evidence in the case subject to these instructions." (R. 66-67, 294-295).

and appellant duly made its objection to the giving of the foregoing instruction as follows:

"The plaintiff also wishes to take exception and objects to the submission to the jury and in the instructions to the jury on the ground that the agent who took this application, the question of whether he was negligent and careless in obtaining the application — the point that we wish to point out to your Honor and object to and take exception to, is that there is no duty in the first instance or any obligation which would permit the question of negligence or lack of negligence to be submitted to the jury. And secondly, that even if that were a proper issue in this case, that the evidence conclusively shows that due care was used.

"There is not a scintilla of evidence or any facts whatsoever to permit the jury in this particular case to define, to find that the plaintiff or its agents did not use due care and diligence.

"Therefore, it is a submission of the question of fact first of which there is no issue, and second, if there was an issue, that it is conclusively shown that the plaintiff did comply with all of the requirements of law." (R. 302)

STATEMENT OF THE EVIDENCE

From a review of the evidence received this case is unique in at least two respects: (1) All of the evidence which the jury was entitled to consider was presented by appellant's witnesses and exhibits and was introduced on appellant's case in chief; and (2) the facts relevant to the issues submitted to the jury were undisputed as appellees introduced no evidence which would tend to contradict, discredit or weaken this evidence. Appellant will have occasion in the course of this brief to stress the importance of these two unique facets.

On April 16, 1957, towards the close of the business day, defendant McKinzie walked into the office of Bucholz Insurance Agency in Portland, Oregon, and advised their office manager, Reuben Edward Snyder, that he wished to procure an automobile liability policy covering an automobile which he had purchased earlier in the day from a used-car dealer (R. 138). McKinzie had never had any previous dealings with the Bucholz Insurance Agency, with Snyder, or with appellant (R. 154). Snyder was alone in the office and proceeded in a routine manner to obtain the necessary information from McKinzie in order that an insurance policy might be issued by appellant. Appellant's procedure required that certain information be obtained and a form to be filled in in triplicate had been furnished for this purpose (Ex. 1) (R. 140). Snyder proceeded to ask questions of McKinzie concerning his name, address, type of car, etc., and from the answers given to him fill

in the necessary blanks upon the application form. Snyder testified that he read aloud all of the questions which appear upon the application and that McKinzie orally made the answers which in turn were written down on the application by Snyder (R. 140-141, 154). The pertinent questions and answers are as follows:

APPLICANTS STATEMENT

(Under No Circumstances will the Exchange be bound unless all questions below have been answered)

1. Have you or ANY DRIVER of this car—
   (a) any physical impairment? ....No....
   (b) had auto insurance cancelled or refused? ....No....
   (c) had license revoked or suspended? ....No....
   (d) received any driving charges, citations or fines (not parking) in past 3 years? ....No....
   (e) been involved in any auto accident as a driver in past 3 years? ....No....
2. Name of previous insurer ....None....
   Policy Number.....
3. Name and address of Employer ....Page & Page Truck Equipment Co..... ....Portland....
4. The vehicle (is) is not used in the duties of my present occupation.
5. The following are the only other drivers of this vehicle living in the household:

Name	*Age*	*Relationship*	*% Of Driving*	*Single or Married?*
None				

6. How long have you known Agent? ....New....
7. Did Agent inspect vehicle? ....Yes....
8. Any unrepaired damage noted? ....No....
9. I am (single) married.
10. My age is 40 and birthdate.....
11. How many cars in the household? ....One....
12. If vehicle not garaged at above address, state where .....
13. How long living at present address? ....2 years....

"Q. About 6:00 p.m. Did he ask you any of these questions on the applicant's statement or did he just fill them out?

A. He asked me.

Q. He asked you some questions. Did he ask you all of the questions that are on this applicant's statement?

A. I think he did, yes.

Q. He asked you every one of those questions?

A. That's right.

Q. Did he ask you if your license had been suspended?

A. Evidently he did.

Q. Do you remember that definitely or not, or can you remember?

A. I think he must have.

Q. You think he must have?

A. Uh-huh. He read all of the answers off there and I just said, no, no no." (R. 123)

At no place in the testimony of Snyder or in the deposition of McKinzie is there any dispute that the answers which appeared upon the application were other than those which McKinzie made himself. There is no indication that McKinzie did not understand the questions nor is there any indication that any additional explanation or elaboration was in any way given by McKinzie in connection with any of these answers.

After all of the answers to the questions appearing on page 1 of the application had been written down by Snyder, McKinzie signed the application "A. A. McKinzie," (R. 142), made a down payment of $20.00, on account of the premium, and received a receipt for this amount together with a duplicate copy of the application (R. 142). The application was then sent to the

underwriting department of appellant in Seattle, was duly processed, and, as the application was in all respects regular and indicated what would be considered a good risk, an insurance policy (Ex. 3) was duly issued and delivered to McKinzie.

Following the automobile accident of June 8, 1957, when appellees were injured the appellant in the course of its investigation learned for the first time that a number of the answers which were given by McKinzie in his application were false. The investigation disclosed that McKinzie had had his license revoked or suspended in the State of Oregon, that he had had a traffic violation in the State of Oregon, and that at the time he made the application for insurance he did not have an operator's permit in the State of Oregon. After McKinzie's deposition was taken, in which he admitted a traffic violation in California, an inquiry was made to the California Department of Vehicles and it was then learned for the first time that McKinzie had had at least three traffic violations in that state within three years prior to the application. In his deposition McKinzie also admitted that he had had previous insurance with other companies. The witness Ray G. Carlson, who testified in his capacity as the underwriting manager for appellant, stated categorically that if the information relative to McKinzie's previous driving record had been clearly set forth in the application that appellant would not have issued the policy (R. 160-163).

SUMMARY OF ARGUMENT

The first and second of the foregoing specification of errors, namely refusing to grant appellant's motion for a directed verdict, and denying appellant's motion for an order setting aside the verdict and for entry of judgment n.o.v., involved the same question of fact and principles of law. It is contended by appellant that each and every allegation of appellant's complaint was conclusively proved and that there was not an iota of evidence to support the alleged defense of negligence raised by appellees; hence appellant was entitled to a directed verdict. We will therefore discuss both of these specifications under "Argument I." Specification of Error 4 covers the failure of the court to withdraw the alleged defense of negligence (plaintiff's requested instruction No. 2, R. 43) and Specification of Error 5 covers appellant's objection to the court's instructing the jury that common law negligence of the agent who took the application for insurance would bar equitable relief requested by appellant. If appellant is correct in these contentions the court erred in failing to grant appellant's motion for a new trial, Specification of Error 3. We will therefore discuss these three specifications of error under "Argument II" and our discussion will be extremely brief, since the points involved will have been thoroughly considered under "Argument I." Obviously, if this court holds that appellant was entitled to a directed verdict it will be unnecessary to consider these specifications of errors.

By way of introduction and before proceeding to take

up in detail the particular issues raised by this appeal, appellant feels that it may be of assistance to this court if attention is directed to certain peculiar features of this case which became apparent as it progressed but which might be overlooked upon considering the cold transcript of record. Taking together the pleadings, the pretrial order, the opening statement of appellees, and the evidence which was offered by appellees, it is unmistakably clear that the defenses raised in this case were grounded upon theories of estoppel, waiver and laches. These particular defenses were in the course of the trial properly withdrawn from the case but only after appellees had introduced their only evidence through the testimony of the witnesses Dorris, Rose Marie Gilmont, Kosta and Colbert. None of the testimony of these witnesses in any way related to the issues as finally submitted to the jury. To the contrary, these witnesses were all testifying as to events which occurred subsequent to the accident of June 8, 1957, and from the instructions by the court to the jury anything which transpired subsequent to that date was entirely irrelevant and was in no way to influence them in determining their verdict (R. 288-289). Nowhere in the opening statement made by appellees' counsel is there any indication that they expected in any way to prove any negligence on the part of appellant in taking the application from McKinzie nor was any contention made that they would introduce evidence to show that the false representations made on the application were not material. Obviously, from the opening statement their case was to be based upon the defense of estoppel or waiver or laches or a

combination. Nowhere in the trial of the case did appellees attempt to introduce any evidence that appellant's conduct in taking the application on April 16, 1957, was in any way negligent.

ARGUMENT

I

At the close of the trial the court instructed the jury that they had two issues to determine (R. 287). The first issue concerned the question of the effect of the representations which were made by McKinzie in his application and the second concerned the question of whether appellant acting through Snyder was careless and negligent in obtaining and completing the application.

It is the position of appellant in regard to the first issue that the evidence conclusively established all the elements which would be necessary to permit it to legally rescind the insurance policy, so that there was no issue to be submitted to the jury.

Appellant had the burden of proof as set forth in *Amort v. Tupper,* 204 Or. 279, 282 P.(2) 660, to establish all of the following elements necessary for rescission:

(1) Defendant McKinzie made certain representations in his application.

(2) These representations were false and were made with knowledge of their falsity or were made recklessly and without any regard to their truth or falsity.

(3) One or more of these representations were made for the purpose of inducing appellant to act upon them.

(4) One or more of these representations were material.

(5) Appellant relied on the representations.

(6) Appellant suffered damage.

We will take up the foregoing elements in the order listed.

Defendant Made Certain Representations in His Application

As heretofore set forth in "Statement of the Evidence," McKinzie made certain representations relative to his driver's license, traffic violations, automobile accidents, and the status of prior insurance policies. There is no dispute that these representations were made.

The Representations Were False and Were Made With Knowledge of Their Falsity or Were Made Recklessly and Without Any Regard to Their Truth or Falsity

As to McKinzie's representation that he had never had his driver's license revoked or suspended, McKinzie admitted this representation was false.

"Q. Now, do you have an Oregon driver's license now?
A. No.
Q. Have you ever made application for one?
A. I did.
Q. When?

A. After that.
Q. When?
A. After that 'no muffler' charge.
Q. What was the effect of that?
A. Suspension for a year. (48)
Q. When did you make application, about when?
A. February, after this 'no muffler' charge.
Q. Of 1956?
A. 1956, correct.
Q. And they said they would—
A. The State suspended my license for a year and I thought it was a real bum rap.
Q. Do I understand you correctly now, after your muffler citation sometime in February of 1956 you made an application to the State of Oregon for a driver's license?
A. That is correct.
Q. And they then advised you your driving permit or license in the State of Oregon will be suspended?
A. For one year.
Q. For one year, from approximately February 1956 to February 1957?
A. That is correct.
O. Now, did you ever get a driver's license from the State of Oregon?
A. Not after that, no." (R. 112)

As to McKinzie's representation that he had not received any driving charges, citations or fines in the past three years, McKinzie admitted that this was false.

"Q. Now, were there any driving charge, citations or fines in the three years prior to the time you made this application?
A. Here in Oregon?
Q. Any place. (52)
A. Well, I might have had some tickets in Los Angeles, if that is what you mean.

Q. What would they be for?

A. For motorcycles. I used to drag race once in a while.

Q. What would be the citation? Would it be for overtime parking?

A. No drag racing.

Q. For speeding?

A. Drag racing. Just drag it from a signal, a motorcycle.

Q. Would that be within three years prior to the time you made application for this insurance?

A. It could be.

Q. Well, let's put it down to states.

A. A motorcycle is a little different than an automobile.

Q. I appreciate that. In the State of Oregon in the three years prior—

A. No tickets at all.

Q. What about this 'no muffler' charge?

A. Well, that is the only one.

Q. Other than the 'no muffler'?

A. There was no fine even connected with that. The fact, the judge was mad the State had suspended my license or, hadn't suspended my license, but the judge was real (53) mad, he figured it was up to him to do the suspension instead of the State. So he wouldn't even fine me.

Q. All right. But there was a traffic violation in Oregon.

A. That is the only one.

Q. Within three years, and that was the 'no muffler'?

A. Yes.

Q. And that was down in Corvallis?

A. That's right.

Q. Other than that, there was none within three years?

A. That's right.

Q. How about the State of California, within three years of April 16, 1957?

A. I told you the drag racing.
Q. Any others?
A. That is all." (R. 115-117)

As to McKinzie's representations that he had had no previous insurance carriers, McKinzie admitted this representation was false.

"Q. All right. Now, directing your attention to question 2, under the same applicant's statement—
A. Uh-huh. (57)
Q. 2, I didn't put that down. Is that correct?
A. No, because I don't recall the insurance companies that I have done business with.
Q. Well, do I understand you that—
A. I hadn't had any insurance for quite a while then.
Q. Do I understand you, then, that the answer to number 2 was given as, 'None,' because you didn't recall the names of the companies?
A. That's right, I don't carry all of this stuff around in my pockets.
Q. But you did have previous insurance?
A. Yes, I bought several different cars on time, naturally I was insured." (R. 119-120)

"Q. Would it be correct to say that your answer to number 2 under your 'Applicant's statement' is not correct, is that right?
A. That's right.
Q. It is not correct?
A. He wrote it in there himself, the agent did.
Q. Well, where did he get the information?
A. Probably from me, I don't have any insurance policies in my pocket.
Q. Did he get all of this information from you?
A. Evidently, I was the only one there." (R. 122)

At no time did McKinzie contend that he did not understand the questions or that he had a lapse of memory. To the contrary, his only explanation seems to be

that he thought the suspension of his Oregon driver's license was a "bum rap" and that since he had had so many other insurance carriers he could not remember any of the names he answered this question by saying that he had had none.

In addition to the representations that McKinzie admitted were false, documentary evidence (Exs. 19A, 19B, 19C, 19D) showed that he had had three traffic violations in California within three years prior to the date of the application. There is therefore no dispute that certain of the representations made by McKinzie were false.

One or More of These Representations Were Made For the Purpose of Inducing Appellant to Act Upon Them

McKinzie came into the office of the Bucholz Agency solely for the purpose of securing insurance on the automobile which he had purchased earlier in the day. He initiated the negotiations leading up to the issuance of the policy and it was incumbent upon him to make full disclosure of all the information which appellant felt was necessary in its determination of whether or not to issue the policy. McKinzie signed the application and received a copy thereof. Immediately above his signature was printed the following language:

> "I declare the facts within the applicants statement to be true and request the Exchange to issue the insurance in reliance thereon."

No one could come to any other conclusion than that which is apparent from the uncontradicted evidence,

namely, that McKinzie had no other purpose in giving the information requested than to secure a policy of insurance from appellant so that the representations that he made were intended solely for this purpose and there was no issue thereon to be submitted to the jury.

One or More of the Representations Were Material

The only direct testimony upon this issue came from the witness Ray T. Carlson, who unequivocably established that if McKinzie had made an honest disclosure of the facts concerning his driving record the appellant would under no circumstances have issued the policy. This testimony was corroborated by Plaintiff's Exhibits 22 and 23 which were the manuals prepared for the use of the various agents.

Appellant concedes that in an action for rescission based upon fraudulent representations the question of whether one or more of the false representations were material is one of fact. Appellant's position on this question is that the evidence adduced in this case conclusively shows that one or more of the representations made by defendant McKinzie were material and that the trial court should have so ruled as a matter of law. While appellant is unable, after an exhaustive search, to point to any one case holding that such representations were material as a matter of law in connection with rescission of an automobile liability policy, there are numerous cases dealing with life, accident and health insurance where comparable false representations have been held material as a matter of law. There are numerous pol-

icies in which the trial court held that the false representations were material as a matter of fact and impliedly indicated that they considered the false representations material as a matter of law. There are likewise cases dealing with the same subject by appellate courts who were not called upon to decide whether the false representations were or were not material as a matter of fact but who impliedly did consider the false representations material as a matter of law. We will first consider the recent cases dealing with rescission of automobile liability policies.

State Farm Mutual Auto. Ins. Co. v. West, 149 F. Supp. 289, was a case which was remarkably similar on its facts to the instant case. There, in an action under the Declaratory Judgment Act, it appeared that plaintiff, in reliance upon West's representation that his operator's license had never been suspended or revoked, issued a liability policy.

As in the instant case, the insurance company in the course of investigating an automobile accident which occurred between defendant West and the other defendants, discovered for the first time that West's license had been revoked and the court having tried the case without a jury, after making appropriate findings, stated at p. 305:

> "The court has no difficulty in holding that the answers in the applications were representations made by West to the plaintiff. A material misrepresentation made by an applicant for insurance, in reliance on which a policy is issued to him, renders the policy voidable as against the applicant and all

> who stand in no better position, whether such misrepresentation be made intentionally, or through mistake and in good faith. (Citations omitted) Where evidence of bad faith or falsity or materiality is uncontradicted or clear and convincing, the court may so rule as a matter of law. The court, already having found as a fact that the negative answers to questions 16 and 18 in the applications were material, false, and relied upon by the insurer in issuing the policies, so rules as a matter of law."

It is interesting to note that in *State Farm Mutual Auto. Ins. Co. v. West,* supra, the assured, West, and the persons injured and charging West with negligence were all made parties defendant, that all defendants contested the right of the plaintiff to rescind the insurance policy, and that all defendants pleaded estoppel as a defense. In commenting on the defense of estoppel as to assured West, the court stated: "That one cannot profit from his own wrongdoing is clear" (citing cases) and then went on to quote from *New York Life Ins. Co. v. Odom,* 93 F.(2) 641, certiorari denied 304 U. S. 566, as follows:

> "Since the insured furnished false evidence which was relied upon by the insurance company, he was guilty of fraud in law which would avoid the policy, whether he was in good or bad faith and whether he intended to deceive or not. (Citations omitted) It is elementary that one who is guilty of fraud cannot urge estoppel against the other party to the contract for the purpose of making his fraud effective."

In commenting on the same defense of estoppel raised by the injured defendant the court stated at p. 307:

> "Ordinarily an injured person has no better or

> different rights under the policy than the insured (Citations omitted). Assuming, *arguendo,* that there may be cases in which by estoppel an injured person may have rights superior to those of the insured as against the insurer, this is not such a case. There is absolutely no evidence whatsoever that the injured defendants have been misled to their prejudice or into an altered position, an indispensable element of estoppel."

It is further interesting to note that in all cases we have read covering rescission of automobile insurance policies on the grounds of fraud where the assured and the injured parties were defendants, that the assured actively defended the attempted rescission. In our case the assured, McKinzie, not only did not appear but in his deposition admitted all the claims of appellant as to the fraud perpetrated upon it. It is clear that an injured person has no better rights under the policy than the assured, in the absence of special circumstances such as collusion between the assured and the insurance company, and we suggest to the court that the defendant McKinzie having defaulted, the allegations of the complaint are established as true as to defendant McKinzie and therefore the appellees Gilmont having no greater rights than the assured, stand in the same position as the defaulted assured McKinzie. This was suggested to the court by appellant (R. 304) and in reply the court said:

> "The Court: I understand your position in this matter about it. I'll restate my position about it. As far as I know the interests of the defendants Gilmonts and the defendant McKinzie are adverse. For all I know, maybe he is staying away pur-

> posely. Their respective rights being adverse, they are not standing in privity to each other. This is a controversy being purchased here between plaintiff and the defendants Gilmonts. That's my position."

The fallacy in the court's position is that there is not a scintilla of evidence or the slightest suggestion that there was any collusion between appellant and defendant McKinzie and appellees did not contend that there was. We have been unable to find any case dealing with the rights of injured persons, who are not necessary parties to the litigation, to resist the claim of rescission where the assured has defaulted and thus admitted the right to rescind, but logically it would appear to us that the injured persons, in the absence of collusion, have no standing to resist rescission where the assured by his default has admitted that the insurance company has the right to rescind.

In *Tri-State Ins. Co. v. Ford*, 120 F. Supp. 118, two policies of insurance were involved, one a physical damage policy and the other a public liability policy. It would appear these two combined policies were comparable to the insurance policy in this case. The assured, Ford, was involved in an automobile accident in which the co-defendants were injured and thereafter action was brought by the insurance company pursuant to the Federal Declaratory Judgment Act.

The District Court in its opinion stated that the evidence established that the assured had made false representations in obtaining the policy, namely, that no policy had been cancelled during the previous year,

whereas five policies had been cancelled during the period; that the insurance company relied on the false and fraudulent representations; that said misrepresentations were material to the risk in said policies of insurance; and that the insurance company would not have issued the policies if it had known of the cancellations. The insurance policies contained a provision which is identical with condition 22 of our policy (Ex. 3). Decreeing rescission of the policy on account of fraud, the court stated: P 121-122

> "As recognized in the enumerated findings of facts, the insured secured this policy by fraudulently representing a fact material to the involved risk; and, although the soliciting agent for the plaintiff was negligent in not establishing that said representation was false, the policy was in fact issued in reliance upon the insured's false warranty. Under such circumstances the insured has no standing in a court of equity to resist a petition for cancellation."
>
> * * * * *
>
> "In addition, the insured in the case at bar cannot by means of parol evidence attempt to impeach the unambiguous terms of the written insurance contract."

In *Adriaenssens v. Allstate Ins. Co.*, 258 F. (2) 888, the injured parties sued the insurance company direct on the insurance policy after obtaining judgments against the assured, who died after the judgments against him were obtained. The defendant insurance company pleaded as a defense fraud in the procurement of the policy in that the assured falsely represented that his driver's license had never been revoked.

Rescission was granted by the court without a jury and on appeal the Court of Appeals, Tenth Circuit, stated at p. 889:

> "The court found among other things that the representation was made in the application for the policy; that it was untrue; that the driver's license of the insured had been twice revoked because of drunken driving; that the representation was material; that it was relied upon by the insurer; and that the policy would not have been issued if the revocations of the license had been disclosed. Judgment was entered in each case denying recovery upon the policy; separate appeals were perfected; and the causes were submitted in this court upon a single record."

After disposing of various contentions of plaintiff as being without merit, the Court of Appeals took up the complaint that the court erroneously placed upon appellant the burden of proof respecting the issue of fraud in the application for the policy of insurance. On this point the court said at p. 891:

> "It is argued that the court in effect required appellants to prove that there was no fraud on the part of the insured. Of course, the burden rested upon the appellee to establish by evidence its affirmative defense of fraud on the part of the insured. Recognizing such burden, the appellee introduced in evidence the application signed by the insured and containing the representation that his driver's license had never been revoked. Appellant (sic) introduced in evidence official records showing that on two separate occasions the driver's license of the insured had been revoked upon the ground of drunken driving. And it was stipulated that if a representative of appellee from its office in Kansas City, Missouri, were present he would

> testify that he was familiar with the policies of the company in respect to issuing insurance to persons whose driver's license had been revoked; that in determining whether to issue a policy, appellant relied upon the representations contained in the application; and that the policy in question would not have been issued if the appellant had known of the revocations of the license issued to the insured. That evidence—considered in its entirety—was sufficient to establish a prima facie case of fraud on the part of the insured in obtaining the issuance of the policy. The court did not place upon appellants the burden of proof respecting the issue of fraud. Instead, the court merely determined that appellee introduced evidence establishing a prima facie case of fraud which was not met or overcome by persuasive countervailing evidence."

Presumably there was no testimony contradicting the evidence of fraud and if this is so, the case is squarely on all fours with our case. If there was contradictory evidence or a dispute thereon our case is even stronger, since there was no contradictory evidence whatsoever.

Klim v. Johnson, 16 Ill. App. (2) 849, 148 N.E. (2) 828, was a proceeding whereby a person injured, after obtaining a judgment against the assured, Johnson, brought in the Allstate Insurance Co. to recover the amount of the judgment obtained against Johnson. The insurance company defended on the basis that the contract of insurance had been rescinded because of fraud perpetrated upon it by Johnson. The alleged fraud was the failure of Johnson to divulge when his application for the policy was taken that a prior automobile policy had been cancelled. As in our case, the answers to the questions required by the written application were writ-

ten in by the soliciting agent and the policy when issued contained provisions comparable to conditions 19 and 22 of our policy. There was a dispute as to whether the agent had correctly written down the answer relative to cancellation, the assured, Johnson, contending that he had advised the agent of the prior cancellation. The trial court held that Johnson had falsely answered the question relative to cancellation and allowed the rescission of the policy by Allstate to stand. On appeal the plaintiff contented that the trial court had erred as a matter of fact and in law in holding that Johnson made misrepresentations which entitled the insurance company to rescind the contract, together with other alleged errors which are not pertinent to this inquiry. It should be specifically noted that the controversy as to the facts was whether or not Johnson had made a false representation and there appears no question that if he did make the misrepresentation, which the trial court found he did, that such false representation would be material, for the Appellate Court stated:

> "Representations made by an applicant for automobile insurance, as to prior cancellation and frequency of accidents, are matters which materially affect the risk insured against. Allstate was entitled to that information to determine if it was willing to assume the defendant as a risk. The evidence establishes that Johnson made material misrepresentations, both as to prior cancellations and as to accident experience. The trial court had sufficient evidence before it to find that Johnson made material misrepresentations at the time of application for insurance.
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> * * * * *

"Primarily, this case is a question of good faith of the insured in answering the application question regarding prior cancellations, which was followed by the policy accepted by him, containing a *declaration* negating prior cancellations. The trial court could have found it difficult to believe that Johnson misunderstood the meaning of 'cancel' or 'cancellation,' as used in the notice sent him by Industrial or by the letter of the Standard State Bank, notifying him to replace the 'cancelled' policy.

"When the policy issued, it embodied the contract and gave notice that its terms could not be waived or changed by an agent. The law cannot be that at the very moment the policy was delivered, the declaration as to 'no prior policy cancellations within two years' was waived and meaningless, and that the declaration negating the same did not mean what it said. If that were the law, it would be possible by parol evidence to destroy many documents, lucid in form and with no question of construction involved. The policy in suit, with the 'Declarations' attached, is a document complete in itself, and the plaintiffs cannot successfully contend that Johnson took it, presumably read it, and yet, as a matter of law, is not bound by the 'Declarations' and 'Conditions' set forth therein. This court has consistently supported this doctrine."

We believe that there is no Oregon case dealing with rescission of an automobile liability policy on the grounds of fraud so we turn now to cases dealing with rescission of life insurance policies on the grounds of fraud which, we submit, where the fraud is based on the application for the policy, are identical in principle wth the automobile liability policy cases.

One of the leading Oregon cases is *Mutual Life Ins.*

Co. of N. Y. v. Chandler, 120 Or. 694, 252 P. 559. In this case the insurance company brought action to rescind the policy on the grounds of fraud and the beneficiary under the policy filed a cross bill for the recovery of the amount of the policy. Decree was for the defendant and the plaintiff appealed. One of the questions asked on the application form was to state the diseases since childhood and the assured answered this by listing some minor ailments. Another question was to state each physician who had treated the assured or whom the assured had consulted in the past five years. To this last question the assured answered "None" except naming one doctor.

The policy in question provided in part as follows:

> "This Policy and the application herefor, copy of which is endorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the Insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the Insured shall avoid or be used in defense to a claim under this Policy unless a copy of the application is indorsed on or attached to this Policy when issued."

There was a dispute as to whether the assured had tuberculosis or even if he had as to whether he knew that he had, but there was no dispute that the assured had consulted other doctors than the one listed during the five-year period.

The court on appeal first discussed the difference between a warranty and a representation and held that the answers to the questions were in the nature of rep-

resentations and that the issue therefore "depends upon whether an untrue answer to the question about his having consulted other physicians is material." The Supreme Court then went on to show the distinction between the answer to the question of whether the assured had been afflicted with a disease and the answer to the question requiring the assured to list the names of all doctors who had treated him during the past five years. The court pointed out that as to the first question in many instances the assured would not know whether he was or was not afflicted with a disease and that therefore in order to constitute fraud there must be "an element of wilfulness or knowledge that the statement on that point is untrue in order to bind the assured", and therefore in deciding the case disregarded the answer to the first question. However, as to the second question the court said: at p. 698:

> "The representation, however, that he has not consulted or been treated by any other physician is one peculiarly within his knowledge and the law requires in such a case the utmost good faith and full disclosure in answer to direct inquiries on the part of one making an application for the policy."

In reversing the trial court and decreeing rescission the court quoted with approval from *Lewis v. New York Life Ins. Co.*, 201 Mo. App. 48, 209 S.W. 625, as follows:

> "Insured's statement in application for life policy that he had consulted but one physician when in fact he had consulted a number related to a matter forming the very basis or foundation of the contract, and worked a legal fraud on the company whether applicant intended to deceive or not."

* * * * *

"It is not a question of whether these consultations were for Bright's disease or whether he was suffering therefrom or his death hastened thereby; nor is it a question of whether he thought these consultations were material or not. He was answering questions which the company wanted to know the truth about before it would enter into the contract. It had the right to know the truth in order that it could decide for itself whether it would insure him or not. If it had known he had consulted various other doctors recently and for other matters, it could have investigated on its own account and decided for itself whether it would take him as a risk. Nor would it have been necessary then to establish beyond doubt that he was in fact suffering with a serious and insidious disease; for at that time the company had not entered into the contract, could not be compelled to do so, and could be as 'squeamish' about accepting him as a risk as it desired to be. If it was fearful that he might have incipient Bright's disease, it could have refused the insurance though all the world said he did not have it. To allow him to refrain from giving full, true, and complete answers to the specific questions then asked, on the ground that he did not think the answers *material,* would be to let him decide for the company whether it should undertake the risk." (Emphasis added)

Then speaking for itself the Supreme Court of Oregon stated:

"In the instant case, the assured did not die of tuberculosis or any of the diseases involved in the inquiry, but that is not the question. The parties were negotiating for the purpose of making a contract of insurance. Each was entitled to the exercise of the utmost good faith on the part of the other. The assured had made an offer to the company couched in certain terms. He said, in sub-

stance, 'I am a man who has consulted only one physician whom I name and that merely for mild attacks of influenza and tonsilitis which did not prevent me from working at my usual occupation.' Possibly without wicked intention he neglected to state the names of the other physicians with whom he had consulted and who had treated him for tuberculosis. While he might have been ignorant of the existence of the disease, he was not ignorant of the fact he had consulted and taken treatment from at least one other physician. Having directly asked for it, the company had the right to know the exact truth on that subject. It was entitled to a fair offer without concealment, so that it could use its own election about accepting that offer. . . . The concealment of the fact peculiarly within his knowledge that he had consulted other physicians was to stiflle legitimate inquiry on the part of the insurer while the negotiation was yet in the formative stage.

* * * * *

"To hold otherwise would take from any party considering an offer the right to accept or reject the same, and this too at the behest of the other party, although the latter had stifled investigation by the concealment of matters which would naturally challenge the consideration of the other."

We submit that the terms of the two types of policy are comparable and, if anything, the terms of the automobile liability policy are more stringent, and that the false answers McKinzie gave that his driver's license had never been revoked or suspended or that he had never had any accidents in the past three years are comparable to and just as material as that the assured had consulted only one doctor.

The cases are myriad along the same line as *Mutual*

Life v. Chandler, supra, but we will only cite one other case arising in a jurisdiction outside Oregon, and that is *National Life and Accident v. Gorey*, 249 F.(2) 388, decided by this court on November 6, 1957. This case arose in California and it is our belief that the law of California relative to the rescission of a life insurance policy on the grounds of fraud is the same as that of Oregon. In reversing judgment in favor of the beneficiary under the policy and directing entry of judgment in favor of the insurance company except as to the sum of the premium tendered, this court stated:

> "It is important to remember that defendant was entitled, not only to know that decedent was in good health when insured, but also was entitled to have before it, before issuing the policy, a truthful statement by the proposed insured of his medical history. If we assume, (as we do here because no evidence exists to the contrary) that there was no intent on the part of the decedent to deceive or defraud the insurance company, and that his answers were innocently, though carelessly, given, his lack of intent to defraud is not controlling. The misstatement, according to the only evidence on the subject, was relied upon by the defendant, and did materially affect the defendant's willingness to accept the risk. The defendant asked for specific answers to two certain questions: the answers given were not true, and defendant was denied the right to determine for itself the matter of the deceased's insurability, and the underwriting risks it was willing to undertake. Robinson v. Occidental Life Ins. Co., 131 Cal.App.2d 581, 586, 281 P.2d 39, 42. This is a right that any insurer has, and must have.
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> * * * * *
>
> "As a matter of law, the evidence in this case shows that the deceased by incorrect and untrue

> answers misrepresented and concealed material facts; that defendant relied on such misrepresented facts, and issued its policy in reliance thereon. Because of this, the defendant's motion for a directed verdict or for a judgment n.o.v., should have been granted by the trial court." (Citations omitted)

In the instant case the defendant McKinzie came to the appellant seeking to enter into a contract of insurance which would provide liability coverage on the operation of his automobile. As in the case of any other applicant the appellant required certain information from which it would determine whether or not it would enter into such a contract of insurance. The questions which are set out in that portion of the application entitled "Applicant's Statement" were certainly not capricious. They certainly did not ask for any information which would be difficult to furnish. They certainly were not irrelevant to appellant's decision and they certainly were not ambiguous or unintelligible. The questions simply looked for information concerning the applicant's previous driving record, his ability properly to operate an automobile, what history he had had with previous insurers, if any. This information is certainly as material to the particular risk as would be information on a life insurance policy relating to an applicant's medical history. Certainly the potential exposure of the company under this policy ($10,000-$20,000) is as large as a great number of life insurance policies which are written. For a total premium of approximately $60.00 of which McKinzie actually paid only $20.00, appellant was affording very substantial coverage to the applicant

for a period of six months and this was solely and directly connected with the manner in which he would operate his automobile during that time. Nothing could be more obvious that in considering whether or not to assume this liability the company needed information as to the applicant's history and ability properly to operate an automobile. Certainly the appellant was not interested in whether or not the applicant "smoked black cigars" but it was vitally interested in the experience which he had in driving an automobile.

We submit, first, that the admitted false representations made to appellant by defendant McKinzie were material as a matter of law, or, secondly, even if it be considered that whether these false representations were or were not material was a question of fact, that the evidence conclusively established that these misrepresentations were material. On either theory there was no question of materiality to be submitted to the jury.

Appellant Relied on These Representations

There is not an iota of evidence that the appellant had any intimation that the answers which were given by McKinzie were other than true until it commenced its investigation of the accident which occurred on June 7, 1957. The witness Carlson testified that the usual procedure at appellant's home office was to examine each application which came in from its various representatives and on the basis of the information submitted the decision was made by the underwriters as to whether or not the policy would be issued. Carlson

testified that on the face of this particular application there was not a single feature which would in any way cause an underwriter to reject the application or to make any further investigation as to the facts disclosed. There was nothing in the testimony of McKinzie or of the witness Snyder which would give rise to any suspicion that McKinzie was telling other than the truth as to the questions asked.

Appellant Suffered Damage Because of One or More of These False Representations

There would seem to be little need to elaborate on this point. Obviously, if defendant McKinzie had told the truth at the outset the appellant would never have issued its policy and if this judgment is allowed to stand it will be tantamount to bestowing upon the wrongdoer the benefit of a contract which he instigated through his own fraud. In the field of insurance law the cases have, over the years, developed certain rules which impose very definite burdens and responsibilities on the insurers. However, insurance companies, no less than any other person, are entitled to the benefit of truthful answers which they ask preliminary to entering into a contract. They should not be under the burden of having to assume that each applicant is untrustworthy and that all information given to it must be verified before issuing a policy.

We reiterate that the evidence conclusively established all the facts necessary to a rescission so that there was no issue thereon to be submitted to the jury.

The second theory on which the court submitted this case to the jury, i.e. common law negligence on the part of appellant (R. 294-295), is just as untenable as the first issue submitted.

In appellees' amended and supplemental answer to the complaint of appellant these parties alleged certain facts which they contended constituted (1) a waiver on the part of appellant to have the insurance policy (Ex. 3) set aside on the grounds of fraud; (2) estopped appellant from rescinding the insurance policy; and (3) claimed the relief demanded by appellant was barred by laches. At the pretrial appellees injected into the controversy for the first time the contention that appellant was careless and negligent in obtaining and completing the application for insurance from defendant McKinzie (R. 27). This contention having been injected by the appellees was carried over in identical language to the issues (Pretrial Order R. 30) in addition to the aforementioned affirmative defenses of waiver, estoppel and laches.

The trial court declined to give appellant's requested instruction No. 2 reading as follows:

> "Defendants Gilmont have contended and set up by way of defense to this action that plaintiff was negligent in obtaining and completing the application for insurance from defendant Arthur Allen McKinzie. You are instructed that there is no evidence from which you could find that plaintiff was negligent in obtaining and completing the application for insurance from defendant McKinzie and you will therefore completely disregard this contention and defense in determining this case." (R. 43)

and instructed the jury as follows:

> "Now members of the jury, there is a second issue which is raised by the contention of the defendants Gilmont as to whether or not the agent at the time he took the answers from McKinzie acted with ordinary, reasonable care for the protection of his own company, and in that connection you are charged that the defendants Gilmont have charged that the plaintiff, acting through the agent who took the application, was careless and negligent in obtaining and completing the application of insurance from McKinzie.
>
> You are instructed, members of the jury, that negligence as ordinarily defined, is a failure to do that which an ordinary, reasonable prudent person would do under the same (260) or similar circumstances, or doing that which an ordinarily reasonable prudent person would not do under the same or similar circumstances.
>
> Therefore, if you should find from the evidence that the plaintiff, acting through its agent, was careless and did not act as a reasonably prudent person, being an insurance company, in obtaining the answers from McKinzie while filling out the application for insurance by Mr. McKinzie, and thereby blindly or recklessly put down defendant's answers to the questions without reasonable credulence, you should then find that the plaintiff is not entitled to be relieved of obligation under its policy because then through such action and conduct he would have been, become a party to the transaction." (R. 294-295)

The gist of the court's instruction was that if the soliciting agent, the Bucholz Agency, acting through Snyder, was careless and failed to act as a reasonably prudent person in obtaining the answers from defendant McKinzie while filling out the application for in-

surance, then appellant was not entitled to have the insurance contract declared null and void. It is clear that the court was thinking and instructing the jury along the lines of tortious conduct akin to contributory negligence on the part of appellant since the court instructed the jury "that the defendants Gilmont have charged that the plaintiff, acting through the agent who took the application, was careless and negligent in obtaining and completing the application of insurance from McKinzie "and then went on to give the common law definition of negligence as the "failure to do that which an ordinary, reasonable prudent person would do under the same or similar circumstances, or doing that which an ordinarily reasonable prudent person would not do under the same or similar circumstances." (R. 294)

The signing of the application by defendant McKinzie was testified to by both Snyder and McKinzie and has heretofore been discussed in detail in this brief. The substance of their testimony is as follows: That all of the handwriting on the first page of the application (Ex. 1) with the exception of the signature by McKinzie, was Snyder's; that Snyder read to McKinzie all the questions required in the application, and that he correctly put down the answers given by McKinzie, after which McKinzie signed the application, and received a duplicate original thereof. The last paragraph of the application (Ex. 1) signed by McKinzie is as follows:

"I declare the facts within the applicants state-

> ment to be true and request the Exchange to issue the insurance in reliance thereon. I understand the insurance will in no event become effective prior to the time and date actually applied for, as indicated below."

Thereafter the application was transmitted to appellant who issued the insurance policy (Ex. 3) relying on the information contained in the application. All questions on the application were fully answered, the answers appeared reasonable, and there was not the slightest suggestion of any irregularity which would have aroused the suspicion of appellant when it received the application or for that matter of Snyder when he filled in the application.

It is also equally true, as heretofore pointed out in this brief, that more than one of the answers were false and that the issuance of the policy (Ex. 3) by appellant was induced by the mistake of appellant in believing that the questions had been truthfully answered. Now when appellant seeks to rescind the insurance policy appellees take the position that the equitable relief prayed for by appellant should be denied because of negligence on the part of appellant when it took the application.

There are a number of reasons why the claim that appellant's negligence was a bar to equitable rescission of the insurance policy should not have been submitted to the jury, such as:

(1) Negligence presupposes a duty owed to the party claiming negligence and a breach thereof. Here

appellant owed no duty to appellees or even to defendant McKinzie, for that matter.

(2) Even if appellant was "negligent" in some respects, which appellant does not concede, such negligence was not of the character sufficient to bar equitable relief, i.e., was not "culpable negligence."

(3) If there was any negligence in taking the application, which appellant does not concede, the negligence was that of the Bucholz Agency. The negligence of the Bucholz Agency cannot be imputed to appellant.

(4) Actually there is not a scintilla of evidence that appellant was negligent under any standard, even the lowest.

We will discuss these contentions in the order listed.

The standard of care to be used by the jury under the instructions of the court in this case was the common law standard and it is axiomatic that before there can be actionable negligence at common law or such negligence as would bar recovery on the ground of contributory negligence, there must be first a duty from one party to another and a breach thereof. Now what duty in taking this application did appellant owe to appellees or the public, or for that matter to defendant McKinzie, which it violated? We submit none.

> "Negligence exists only with relation to a duty to exercise care. Actionable negligence is based upon the breach of a duty on the part of one person to exercise care to protect another against injury, by failing to perform, or in the manner of performing, such duty, as a result of which the latter sustains an injury." (38 *Am.Jur.* Negligence, Sec. 12, p. 653.

Even if appellant was negligent in not discovering its mistake in issuing the policy under the abstract definition of common law negligence, such negligence will not bar the relief of a party from his mistake unless it amounts to a violation of a positive duty owed to the party claiming the negligence.

In *Parker v. Title and Trust Company,* et al., 233 F.(2) 505, which was decided by this court on May 4, 1956, the Title and Trust was induced through the fraud of Parker to issue a title insurance policy insuring the title of Parker and agreeing to indemnify Parker in the amount of the policy in the event his title was defective. Actually, the title to the property insured was in the United States. On action being brought by Title and Trust to set aside the policy on the grounds of fraudulent concealment by Parker of certain material facts, Parker (after denying fraud) asserted that Title and Trust was precluded from equitable relief because of its negligence in not discovering that title to the property was in the United States. The trial court found that Title and Trust was negligent in failing to discover that the title was defective, but notwithstanding this finding, held that such negligence was not a good defense and allowed cancellation of the policy, stating at p. 509:

> "The Oregon court's views of the type of positive legal duty whose neglect might give rise to culpable negligence was expressed by the court in Welch v. Johnson, 93 Or. 591, 608, 183 P. 776, 184 P. 280, at page 281, as follows: '(T)he negligence which will prevent the relief of a party from his mistake must be such as will amount to a violation

of a positive duty *owed to another party.*' (Emphasis ours.) It is plain that the view of the Oregon court is similar to that stated in Dixon v. Morgan, 154 Tenn. 389, 285 S. W. 558, 562, as follows: 'All negligence, to be culpable, necessarily implies the failure to perform some duty. * * * It is not a failure of duty to one's self, but to another, that constitutes culpable negligence.' "

It should be noted from the above question that this court uses the term "culpable negligence" and in this connection no clearer exposition of what constitutes culpable negligence can be made than by again quoting from *Parker v. Title and Trust Company,* supra, which reviews the Oregon authorities, at p. 509:

"It appears to be well established by the Oregon decisions that the negligence which will bar equitable relief on account of mistake must be something more than mere ordinary negligence or negligence of the sort chargeable to the title company under the record in this case.

This question is thoroughly discussed in the case of Wolfgang v. Henry Thiele Catering Co., 128 Or. 433, 275 P. 33, 36. In that case the court quoted from its earlier decision in Howard v. Tettelbaum, 61 Or. 144, 120 P. 373, the statement of the rule that 'negligence, in order to bar equitable relief, in case of mutual mistake, clearly established, must be so gross and inexcusable as to amount to a positive violation of a legal duty on the part of the complaining party.' The court also quoted with approval statements of the same rule as expressed in treatises on the subject of 'Equity' in legal encyclopedias. From 21 C.J., p. 88, Sec. 64(c), it quoted: 'Even gross negligence has been held insufficient to prevent relief for a unilateral mistake made with the knowledge of the other party.' It approved the statement from 10 R.C.L. Equity, p.

296, Sec. 40, that: 'The conclusion from the best authorities seems to be, that to constitute culpable negligence the neglect complained of must amount to the violation of a positive legal duty.' "

and at p. 510:

"This view, that relief based on mistake is not barred by mere negligence, but that before such relief may be denied there must be *culpable* negligence, arising out of the violation of a positive duty owed to another party, found practical application in Rushlite Auto. Sprinkler Co. v. City of Portland, supra. In that case the mistake consisted of Rushlite's failure to include in its bid any amount for steel required in a city sewer on which it was bidding. It had obtained the quotations on steel prices from a dealer the day before the bid was filed. It forgot to include them; yet the court granted Rushlite relief by way of cancellation, approving the trial court's finding that the mistake was 'not culpable'.

There is no finding of gross or culpable negligence here, and it is manifest that there could not be such under the facts of this case, for in overlooking the title defect the company was not violating any duty it owed to the Parkers."

In the Parker case, supra, Title and Trust, at the request of Parker, issued its policy of title insurance in a certain amount and agreed to indemnify him up to that amount if the title to the property insured was defective; the title was defective, and the trial court found that Title and Trust by the use of reasonable care and diligence should have discovered the defect and should not have issued the policy. This court held that this did not constitute *culpable negligence* and was therefore not a bar to equitable relief. In our case ap-

pellant issued a policy which in effect indemnified defendant McKinzie against loss up to a certain amount arising out of the negligent operation of an automobile. The two situations are identical: Title and Trust made a mistake in failing to discover a defect in the title which by the use of reasonable care it should have discovered; appellant made a mistake in failing to discover that the answers defendant McKinzie gave were false, and, for the purpose of argument, we will assume that by the use of reasonable and ordinary care it should have discovered that the answers given it by McKinzie were false. In any event, appellant owed no more duty to appellees, or to McKinzie, for that matter, than Title and Trust owed to Parker. If the negligence of Title and Trust did not involve the violation of a positive duty and could therefore not be characterized as culpable negligence, the negligence of appellant, if any, was certainly not of such a character — culpable negligence — as to preclude it from equitable relief.

It should be further noted that several of the Oregon cases cited in *Parker v. Title and Trust,* supra, were cases of mistake not involving fraud, while here we have fraud on the part of McKinzie. In equity and good conscience a more liberal rule should be applied to appellant in this case than should be applied in cases not involving fraud, for, as stated in *Mergenthaler v. Evans,* 69 F.(2) 287, 289 (Ninth Circuit):

> "Nor is one permitted to make false representations which induce another to enter into a contract and then assert that the party defrauded should have been more prudent and ought not to

have believed the representation. Outcault Advertising Co. v. Jones, 119 Or. 214, 234 P. 269, 239 P. 1113. And this rule extends even to where the other party had the opportunity to ascertain the truth for himself. Davis v. Mitchell, 72 Or. 165, 185, 142 P. 788."

Assuming that the transaction between the Bucholz Agency, acting through its employee Snyder, and McKinzie was of such a nature that an ordinarily prudent person in the position of Snyder would have suspected that McKinzie was giving false answers, or even assuming that there were some facts arising out of the taking of the application that would cause a reasonably prudent person in the position of Snyder to make further inquiry or even to investigate the character of McKinzie, this misconduct of Snyder cannot be imputed to appellant so as to bar it from rescinding the insurance policy when it learned the true state of facts, namely, that McKinzie had given false answers to the questions contained in the application. The record is clear that the authority of the Bucholz Agency was limited to soliciting applications for insurance so that any knowledge that it had or should have had as to any irregularity in taking the application or knowledge of any fact or facts that would put the Bucholz Agency on notice that false answers had been given in the application cannot be imputed to appellant. Moreover, the burden was upon appellees to establish that the agent had authority to bind appellant and they produced absolutely no evidence in this respect.

"The burden is upon the plaintiffs to establish

that the agent had real or apparent authority to bind his principal. (Citations omitted) Before an insured may rely upon apparent authority of an agent, it must appear that the principal knowingly permitted the agent to act as having the authority, and further that a person dealing with the agent acting in good faith would have reason to believe, and did in fact believe, that the agent possessed the necessary authority.

* * * * *

The knowledge of a soliciting agent is not imputed to the principal. Sadler v. Fireman's Fund Ins. Co., 1932, 185 Ark. 480, 47 S. W. 2d 1086. Where an agent has authority to solicit insurance, receive and write applications for insurance, and forward them to a general agent or home office for approval, to deliver the approved policy and collect the premium, he is a soliciting agent only, and proof of such facts does not show any authority on his part to waive the provisions of the policy. (Citations omitted) Pinkley, the defendant's agent, was a soliciting agent not empowered to waive policy provisions, and notice to him of policy violations cannot be mputed to the defendant." *Jackson* v. *M.F.A. Mutual Ins. Co.,* 165 F. Supp. 388, p. 391-392.

Further, conditions 19 and 22 of the insurance policy (Ex. 3) provide as follows:

"19. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Exchange from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed for MAYFLOWER INSURANCE EXCHANGE, by an executive officer of its attorney-in-fact, the MAYFLOWER UNDERWRITERS, INC."

> "22. Declarations. By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Exchange or any of its agents relating to this insurance."

These conditions are substantially the same as conditions 20 and 24 set forth in *Tri-State Ins. Co. v. Ford,* 120 F. Supp. 118, and in this last mentioned case the court, referring to the conditions in question, stated at p. 123:

> "In addition, the insured in the case at bar cannot by means of parol evidence attempt to impeach the unambiguous terms of the written insurance contract."
>
> * * * * *
>
> "The insured cannot at this juncture urge that the plaintiff's soliciting agent waived a material part of the involved risk and thus make of no legal consequence the insured's misrepresentation."

See also Jackson v. *M.F.A.,* supra, where the court stated at p. 391:

> "Where the policy itself negates the authority of an agent to waive its provisions, those who deal with such agents must determine at their own risk the extent of the agent's authority."
>
> * * * * *
>
> "The plaintiffs failed to sustain the burden of showing real or apparent authority upon the part of the defendant's agent, Pinkley, to waive the policy provisions or to accept notice on behalf of the company."

Since there is no possibility that the actions of ap-

pellant in taking the application and issuing the policy could constitute culpable negligence so as to bar equitable relief, we may be belaboring this question, but actually there isn't a scintilla of evidence from which negligence of any sort or nature could be inferred. The answers to the questions on the application were of such a nature that the policy was issued as a matter of course. It has been suggested that appellant should have made an independent investigation of defendant McKinzie, but was there any reason for making such investigation?

> "(a) Duty to check answers. No authority has been cited by defendants to support the proposition that there existed any 'duty' on the part of plaintiff to investigate the answers given in the West applications. On their face, they were entirely plausible, and bore no badge of fraud or deception. Plaintiff's underwriters testified that defendant's stated occupation was one as to which plaintiff's experience was average or better than average, and that in view of the answers given, there was no occasion to obtain a report by independent investigation, and that it was not the practice to do so.
>
> The court is not aware of any legal obligation on the part of an insurance carrier to assume that all applicants are untruthful and dishonest, and that no reliance can be placed upon anything they say. Stated differently, the court cannot conceive of a legal duty owing to defendant West to distrust him; or that the reliance by plaintiff on West's answers was a breach of duty toward *him. State Farm Mutual Auto. Ins. Co. v. West,* 149 F. Supp. 289, p. 301-302.
>
> "Appellants invoke the doctrine of estoppel to prevent the appellee from relying upon fraud or misrepresentation in the application for the insur-

ance. One ground of estoppel urged is that the appellee had constructive knowledge of the information available to it through the Department of Public Safety of Oklahoma; that a check of the record of the applicant for the insurance could and should have been made with such department, particularly in view of the statement contained in the application that the applicant had been arrested for a traffic violation; and that failure to make such investigation estops appellee. The duty to investigate where notice of a fact or facts indicate misrepresentation is a relative one depending upon the particular situation. But, absent exceptional or unusual circumstances, an insurer engaged in the business of issuing automobile liability insurance is not required in every case under peril of estoppel to make inquiry at the proper state agency with respect to official records throwing light upon the truth or falsity of the representation in the application that the driver's license of the applicant has never been revoked. And the statement in the application that the applicant had been fined $10.00 for running a red light, together with the further word of explanation that the light changed on him, did not require the insurer under pain of estoppel to make inquiry at the state agency or elsewhere as to whether the license of the insured had been revoked. The plea of estoppel upon the ground of failure to investigate was not well founded." *Adriaenssens v. Allstate,* 258 F.(2) 888, p. 890-891.

We contend that if negligence be a bar to the equitable relief requested by appellant that there is not a scintilla of evidence that appellant was negligent under any standard. Further, if this Court believes that appellant was negligent under some standard that this negligence was minor in character and not of such gravity as to be termed "culpable negligence."

Therefore as we have heretofore clearly demonstrated, since the appellant has conclusively proved all the elements necessary to entitle it to have the insurance policy declared null and void, and, since the alleged affirmative defense of negligence is untenable there was nothing for the jury to pass upon and appellant's motion for a directed verdict should have been granted.

II.

We believe that the trial court erred in failing to grant appellant's motion for a directed verdict and again when it failed to grant its motion for judgment n.o.v. so that it will not be necessary to consider the remaining Specifications of Errors. However, if we are in error in this respect it will be necessary for this court to consider whether the trial court erred in denying appellant's motion for a new trial (Specification of Error 3), which so far as this appeal is concerned is based on the failure of the court to withdraw the affirmative defense of negligence (Specification of Error 4) and in submitting negligence as an affirmative defense to be passed on by the jury (Specifications of Error 5). The instruction requested and the instruction given and the objections thereto are set forth in the foregoing Specifications of Errors totidem verbis and are also set forth in haec verba earlier in this brief when we discussed the second theory, i.e., negligence, on which the court submitted this case to the jury (Argument I). All of the cases cited and all of the arguments in support of our position that the alleged affirmative defense of

negligence should not have been submitted to the jury are equally applicable to these last three specifications of errors. We respectfully refer this court to the aforementioned portion of this brief to substantiate our position that the court erred in instructing the jury that common law negligence barred the equitable relief requested by appellant.

As the court submitted this case to the jury on the theory that appellees were entitled to prevail if appellant failed to establish the right to rescind or appellees established negligence appellant's motion for a new trial should have been granted since at least the theory of negligence was not a proper defense. *Nowery vs. Smith,* 69 F. Sup. 755, 759, affirmed 161 Fed. (2) 732.

"The trial judge is not obliged to charge the jury on a theory alleged in the pleading unless it is supported by substantial evidence. In fact it would be error to do so." *Lynch v. U. S.,* 73 F. (2) 316, 317.

Notwithstanding the fact that error is conclusively presumed, we honestly and sincerely believe that the instruction of the court in submitting the issue of negligence to the jury was extremely prejudicial to appellant. Assuming that the question of the right of appellant to rescind on the grounds of fraud on the part of McKinzie was an issue to be submitted to the jury, which, of course, the appellant does not concede, the evidence was so clear and convincing that defendant McKinzie acted fraudulently that it is hard to believe that a jury would not have held in favor of appellant on this issue. However, when we come to the question

of what constitutes due care we have a most nebulous standard. It would be easy for a jury, whose natural sympathies are with appellees Gilmont, to conjecture that the witness Snyder should have made more inquiries than he did or even that he should have asked questions not required by the application form, or that he should have done numerous other things, even though the procedure followed by the witness Snyder was standard procedure. In short, the evidence was so overwhelmingly in favor of the appellant it is hard to visualize a verdict other than for appellant were it not for the error of the court in submitting the issue of negligence to the jury.

We therefore submit that the court erred in failing to direct a verdict for appellant, and after the jury verdict the court erred in failing to set the verdict aside and enter judgment for the appellant notwithstanding the verdict, and finally in the event that this court is of the opinion that appellant was not entitled to a directed verdict, that the verdict heretofore entered in favor of appellee and against appellant should be set aside and a new trial granted.

Respectfully submitted,

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APPENDIX

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No. 16394

United States
COURT OF APPEALS
for the Ninth Circuit

MAYFLOWER INSURANCE EXCHANGE,
Appellant,

vs.

ROBERT DEAN GILMONT, ROSE MARIE GILMONT and RONALD A. WATSON, Guardian ad Litem for Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor and Norman I. Gilmont, a minor,
Appellees.

BRIEF OF APPELLEES GILMONT

Appeal from the United States District Court for the District of Oregon.

HONORABLE WILLIAM G. EAST, District Judge.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8-59

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Appeal from the United States District Court for the District of Oregon.

HONORABLE WILLIAM G. EAST, District Judge.

JURISDICTION

Appellant commenced this action under the Federal Declaratory Judgment Act (28 U.S.C.A. 2201, 2202) to determine the rights and liabilities of the insurance company, the insured, and injured parties under an automobile public liability insurance policy.

Jurisdiction of the District Court was based on diversity of citizenship under the provisions of 28 U.S.C.A. 1332. Appellant is an unincorporated insurance association organized under the laws of the State of Washington. Defendant Arthur Allen McKinzie, the insured, is a citizen of the State of California, and defendants Gilmont, the injured parties, are citizens of the State of Oregon. The amount in controversy, exclusive of interest and costs, exceeds $3,000.00.

Appellant has appealed from a final judgment of the United States District Court for the District of Oregon and this Court acquired jurisdiction under the provisions of 28 U.S.C.A. 1291, 1294.

OPINION BELOW

The judgment of the District Court was rendered without opinion upon the verdict of the jury. The following opinion was rendered by the District Court in connection with a proposed order of default against defendant Arthur Allen McKinzie which was tendered to the Court by the appellant after the jury's verdict but before entry of the judgment order (Tr. 50-52):

LETTER OPINION

Gentlemen:

This will acknowledge the letter of Mr. Kennedy under date of November 24 enclosing a form of judgment order. Also the letter of Mr. Bosch under date of November 26 enclosing a proposed form of order of default as to the defendant McKinzie, and likewise Mr. Kennedy's letter under date of November 29 in

opposition to the request of Mr. Bosch in his letter of November 26.

It is my belief that pursuant to Rule 55 (b) (2) of the Federal Rules of Procedure, the plaintiff is entitled to have the Court enter an order of default against the defendant McKinzie for his failure to plead or otherwise appear in the action. At the hearing on November 21 I was under the impression that the Clerk could enter the default, but, inasmuch as the claim of the plaintiff was not liquidated, I feel that subsection (2) of Rule 55 applies. This Court is of the opinion that the defendant McKinzie, by his failure to appear in this cause, can in nowise defeat what legal claims the defendants Gilmont might have against the plaintiff by reason of the plaintiff's insurance policy issued to the defendant McKinzie and which the Court held to have been in full force and effect as of the date of the accident from which arose the claims of the defendants Gilmont against the defendant McKinzie and his insurer in the event of a judgment upon the merits against the defendant McKinzie.

This Court feels that the plaintiff is entitled to have an order of default against the defendant McKinzie in the form submitted in Mr. Bosch's letter under date of November 26. Therefore, the order has been entered as of November 21 in conformity with the Court's oral statement.

This Court feels that this order of default is in nowise an order constituting a determination of the merits of the alleged cause of action of the defendants

Gilmont against the defendant McKinzie and is merely a determination of the status of the plaintiff's policy of insurance issued to the defendant McKinzie as of the times and dates involved in the litigation before this Court.

Accordingly, the judgment order as submitted in Mr. Kennedy's letter under date of November 24 is entered as of this date of December 2.

STATUTES INVOLVED

28 U.S.C.A. 2201—

> "Creation of remedy—In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Federal Rules of Civil Procedure, Rule 55, 28 U.S.C.A.—

> "Rule 55. Default
>
> "(b) Judgment. Judgment by default may be entered as follows:
>
> "(1) . . .
>
> "(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has

appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

ORS 736.305—

"*Construction of insurance contracts; incorporation of application in policy.*

"(1) Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made a part of the insurance contract. In that case, if the company delivers a copy of such application to the assured, thereupon such application shall become a part of the insurance contract. If the application is not so delivered to the assured, it shall not be made a part of the insurance contract.

"(2) Matters stated in an application shall be deemed to be representations and not warranties.

"(3) This section does not apply to fidelity and surety contracts."

ORS 482.470—

"*Length of suspension; surrender and return of license.* (1) Except as provided in subsection (2) of ORS 482.430 and in ORS 482.440, the department shall not suspend a license for a period of more than one year."

STATEMENT OF THE CASE

This action was commenced by appellant, Mayflower Insurance Exchange, hereinafter referred to as "Mayflower" under the Federal Declaratory Judgment Act against its insured, Arthur Allen McKinzie, hereinafter referred to as "McKinzie" and against injured members of the Gilmont family, hereinafter referred to as "Gilmonts" to declare the rights and liabilities of the parties and to rescind the coverage provided by an automobile public liability insurance policy.

On April 16, 1957, McKinzie purchased an automobile in Portland, Oregon and was referred by the owner of the used car lot to the local agent for Mayflower. The owner of the used car lot made arrangements for the appointment and furnished some information to the agent (Tr. 102, 104, 125).

At approximately 6:00 p.m. on the same date McKinzie signed an application for insurance which was prepared by the Mayflower agent (Ex. 1, Tr 103-104, 137). A policy of public liability insurance was subsequently issued to McKinzie as of the date of the application (Ex. 3).

On June 8, 1957 McKinzie collided with an automobile operated by Gilmont which resulted in property damages and personal injuries to all of the Gilmonts (Tr. 20). Mayflower immediately commenced an investigation in Toledo, Oregon, where the accident occurred and also contacted McKinzie's landlady in Portland (Tr. 216-221).

On July 2, 1957 Mayflower requested an abstract of driving record of McKinzie from the Oregon Department of Motor Vehicles but failed to enclose the required fee of $1.00 (Ex. 24, Tr. 228-229). The abstract of driving record was received by Mayflower on September 4, 1957 (Ex. 30, Tr. 236). Between July 2, 1957 and September 4, 1957 there was a considerable amount of correspondence between the Oregon Department of Motor Vehicles and the Home Office and Portland Office of Mayflower regarding the driving record and the necessity of forwarding a fee of $1.00 (Ex. 25, 26, 27, 28, 29; Tr. 228-236).

The insurance adjuster for Mayflower contacted McKinzie at the Veterans Administration Hospital in Portland, Oregon on July 26, 1957 and obtained a statement from him and a proof of loss and release for property damages (Tr. 221-222).

On September 23, 1957 Mayflower wrote to McKinzie at the Veterans Hospital and advised him that they were rescinding coverage under the insurance policy because their investigation disclosed that on February 16, 1957 his driver's license had been suspended for an additional year and that this suspension was still in effect on April 16, 1957 (the date of the application) and because their investigation had disclosed that he had been convicted on February 14, 1956 of the traffic offense of "no muffler" (Ex. 8, Tr. 249-251). This action for declaratory relief was filed on October 1, 1957 (Tr. 15).

A pre-trial order was entered in this case (Tr. 18-36). Mayflower contended that the insurance policy was void because certain alleged false and fraudulent representations had been made in the application for insurance including matters in addition to those set forth in the letter of rescission dated September 23, 1957. Gilmonts denied the contentions of fraud and set forth affirmative defenses of negligence, waiver, estoppel, laches and further contended that Mayflower had affirmed the insurance contract by their acts and conduct.

The case was tried to a jury. After Mayflower had rested it objected to any evidence as to the affirmative defenses set forth in the pre-trial order (Tr. 180-181). After considerable discussion between court and counsel (Tr. 181-212), the court withdrew the defenses of waiver and estoppel (Tr. 198) and thereafter Gilmonts were prevented from offering any evidence in connection with these defenses.

The case was submitted to the jury on appropriate instructions that Mayflower had the burden to prove the elements of fraud. The question of negligence on the part of Mayflower was submitted to the jury and all of the other affirmative defenses were withdrawn by the court.

McKinzie did not appear in person or by counsel. He was being represented by the attorneys for Mayflower under a reservation of rights agreement in the personal injury litigation which had been filed against him in the State court by Gilmonts (Tr. 36, 37, 38, 39, 18).

Mayflower did not apply for an order of default against McKinzie until after the trial. During the trial the court inquired as to the status of the record in connection with McKinzie and asked counsel for Mayflower whether it was in a position to ask for a default against him. Counsel for Mayflower stated that they were a little uncertain of it (Tr. 200-202).

The verdict of the jury in favor of Gilmonts was returned on June 20, 1958, and was filed on the same date (Tr. 44). Entry of the judgment was delayed at the court's request until determination of Mayflower's motion for a judgment notwithstanding the verdict and for a new trial. This motion was denied on November 3, 1958 (Tr. 47).

On or about November 21, 1958 Mayflower applied for an order of default against McKinzie. The District Court held that Mayflower was entitled to an order of default but that the default could not defeat the legal claims of the Gilmonts against Mayflower under the insurance policy (Br. 2; Tr. 50-52). The order of default was entered as of November 21, 1958 (Tr. 49-50). The judgment order was entered on December 2, 1958 (Tr. 52-56).

The judgment order adjudges that the insurance policy was valid and in full force and effect; that Mayflower was and is under a duty and obligation to defend McKinzie; that Mayflower is under a duty and obligation to pay any judgment that may be entered against McKinzie and that Gilmonts are not restrained and were entitled to institute proceedings against Mayflower

for the recovery of any judgment that may be obtained against McKinzie (Tr. 52-56).

Mayflower has appealed contending that it was entitled to a directed verdict, a judgment notwithstanding the verdict and/or a new trial. Mayflower contends that it conclusively proved all of the elements of fraud and there was no issue to be submitted to the jury. It further contends that it was error to submit the question of Mayflower's negligence to the jury.

QUESTIONS PRESENTED

We believe that two primary questions are involved in this appeal. They are (1) Whether plaintiff Mayflower was entitled to a directed verdict in a jury trial when it had the burden to prove that it was entitled to rescind its obligations under an automobile insurance policy on the grounds that fraudulent representations had been made by the insured in the application and (2) Whether it was proper to instruct the jury that negligence on the part of the agent who prepared the application would constitute a defense to the action for rescission.

SUMMARY OF ARGUMENT

1. An issue of fact was presented as to whether Mayflower sustained its burden of proof as to the elements of fraud sufficient to justify rescission of an insurance contract.

2. The evidence was sufficient to justify submission to the jury of the question of whether Mayflower was careless and negligent in preparing and taking the application of insurance from McKinzie.

ARGUMENT

I

Mayflower Did Not Conclusively Prove Fraud

Mayflower has discussed some of the evidence in its brief in support of its contention that the evidence conclusively established all of the elements of fraud so that there was no issue to be submitted to the jury. Some of the evidence discussed by Mayflower was controverted or explained at the time of trial and other phases of the testimony have been presented in the light most favorable to Mayflower. In deciding whether a jury question was presented it is, of course, well established that the evidence must be considered in the light most favorable to the party who received the verdict of the jury.

Mayflower never objected to the request for a jury trial and also consented to the case being submitted to the jury on a general verdict (Tr. 268, 280). Mayflower also tried this case on the basis that it was necessary for it to prove all of the elements of actionable fraud. The District Court advised counsel that it was going to submit to the jury the elements of fraud and no exceptions or objections were taken to such instructions (Tr. 278). Gilmonts were entitled to a jury trial

and it was the exclusive province of the jury to decide this case. Dickinson v. General Accident F. & L. Assur. Corp., 147 F. (2d) 396 (CA 9, 1945).

The jurisdiction of the District Court was based on diversity of citizenship. The question of fraud, misrepresentation and rescission should be determined by the law of the State of Oregon, where this policy was issued, where the accident occurred and where this case was tried. Pacific Indemnity Co. v. McDonald, 107 F. (2d) 446 (CA 9, 1939); Dickinson v. General Accident F. & L. Assur. Corp., supra.

Matters stated in an application for insurance have been declared by the Oregon Legislature to be representations and not warranties. ORS 736.305 (2) (Br. 5). Actionable fraud has been defined by the Oregon Supreme Court in Conzelmann v. N. W. P. & D. Prod. Co., 190 Or. 332, 225 P. (2d) 757 (1950), as follows:

> "Comprehensively stated, the elements of actionable fraud consist of: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; (9) and his consequent and proximate injury. (citing cases)." (190 Or. at 350).

The Oregon Supreme Court has repeatedly held that an insurance policy cannot be cancelled unless it is shown that the representations pertain to material matters and have been knowingly and wilfully made by the insured with intent to deceive or defraud the insurance

company. Ward v. Queen City Ins. Co., 69 Or. 347, 138 P. 1067 (1914); Willis v. Horticultural Fire Relief, 77 Or. 621, 152 P. 259 (1915); Eaid v. National Casualty Co., 122 Or. 547, 259 P. 902 (1927); Mutual Life Ins. Co. v. Muckler, 143 Or. 327, 21 P. (2d) 804 (1933).

There can certainly be no question as to the burden of proof in this case. Fraud is never presumed. Each of the essential elements of fraud must be proved and the failure to prove any one or more is fatal to the cause of action. Conzelmann v. N. W. P. & D. Prod. Co., supra.

Having alleged fraud, the burden was on Mayflower to prove the allegations by clear and convincing evidence. Northwestern Mut. Life Ins. Co. v. Wiggins, 15 F. (2d) 646 (CA 9, 1926), cert. denied 273 U.S. 746; Belanger v. Howard, 166 Or. 408, 112 P. (2d) 1022 (1941); Baker v. Deter, 68 Or. Adv. Sh. 411, 336 P. (2d) 903 (1959).

Evidence as to Whether Application Was Delivered to McKinzie

Before Mayflower could rely on any statements made in the application it was necessary to prove that a copy of the application was delivered to McKinzie. ORS 736.305 (1) provides that if the application is not delivered to the assured it shall not be made a part of the insurance contract (Br. 5).

Mayflower attempted to sustain this burden of proof by introducing testimony of its witness McKinzie and testimony of its agent Snyder. On direct examination

McKinzie testified that the agent gave him a copy of the application (Tr. 122). However, on cross examination he testified that he did not remember whether the agent gave him the copy of the application or not, and he did not know whether he had a copy of the application (Tr. 126).

Mayflower's agent Snyder testified on direct examination that he gave McKinzie a copy of the application (Tr. 142). On cross-examination Snyder was impeached from his deposition where he stated that he did not remember whether he gave a copy of the application to McKinzie and that his answer was based on usual practice (Tr. 150). As a matter of fact, Snyder did not actually remember anything that occurred at the time of the application (Tr. 147-153).

This is the type of evidence which Mayflower claims was absolutely conclusive. The jury was entitled to consider whether the application was actually delivered to McKinzie. If it was not so delivered, it was not a part of the insurance contract and Mayflower was not entitled to rely on any statements which may have been included therein.

Evidence as to Driver's License

Mayflower advised McKinzie in its letter of rescission dated September 23, 1957 that they had been advised by the Oregon Department of Motor Vehicles that on February 16, 1957 his driver's license had been suspended for an additional year and that this suspension was still in effect on April 16, 1957 (Ex. 8).

Two motor vehicle driving records were introduced into evidence. One stated that he was suspended on February 14, 1956 for an additional year and that his driving privileges had not been subsequently reinstated (Ex. 7). The other record, bearing a later date, merely stated that he had been suspended on February 14, 1956 for an additional year and indicated that his driver's license was not suspended beyond that time (Ex. 35, Tr. 264-265).

The Oregon Motor Vehicle Department, except under certain stated conditions, cannot suspend a driver's license for a period of more than one year. ORS 482.470 (1) (Br. 5). McKinzie was eligible for an Oregon driver's license on February 14, 1957 and was eligible at the time of the application. He so testified (Tr. 113, 115). He had never applied for an Oregon driver's license at the time of the application because he was using his license from the State of California (Tr. 113-114).

McKinzie considered that he was a resident of the State of California. He was in California during 1951, returned to Oregon to work on a dam and then lived in California from 1952 to 1956 (Tr. 126). The visit to Oregon in 1956 was temporary and he planned to return to California (Tr. 126). He at all times had a California driver's license (Tr. 105, 125).

McKinzie testified that he had an Oregon driver's license in 1947 and that it expired in 1950 or 1951 because he was in California and also out of the country (Tr. 106-107). He testified repeatedly that his license was never revoked or suspended because he never had

a license in Oregon and had never received one after the time that it expired (Tr. 105-106, 114-115).

He was allowed to read the Motor Vehicle record from the State of Oregon and he testified that it was not correct (Tr. 108). He testified that he was never notified that his license was suspended in 1947 and he stated that it was not suspended (Tr. 109-110). He testified that he was never notified that his license was suspended in 1952 for non-payment of a judgment and he did not know whether that portion of the record was correct or not (Tr. 111).

It was necessary for Mayflower to prove by clear and convincing evidence that McKinzie knew that the statements were false and that he made them wilfully with the intention to deceive or defraud the insurance company. Ward v. Queen City Ins. Co., 69 Or. 347, 138 P. 1067 (1914); Willis v. Horticultural Fire Relief, 77 Or. 621, 152 P. 259 (1915); Eaid v. National Casualty Co., 122 Or. 547, 259 P. 902 (1927); Mutual Life Ins. Co. v. Muckler, 143 Or. 327, 21 P. (2d) 804 (1933).

In the Eaid case, supra, the insurance company contended that the insured had made false and fraudulent misrepresentations in his application as to his business and occupation and also as to his monthly income. The court referred to the Oregon statute which provides that statements in an application for insurance shall be deemed representations, and stated:

> "The matter stated in the application pertaining to occupation and income being deemed representa-

> tions and not warranties, in order to affect the policy, must be as to material matters and wilfully made with intent to deceive: (citing cases)." 122 Or. at 555).

The Oregon Court further held that certain evidence was competent and admissible to show that statements in the application were made in good faith and with no intent to deceive or defraud the company.

Neilsen v. Mutual Service Casualty Insurance Co., 243 Minn. 246, 67 N.W. (2d) 457 (1954) was quite similar to the present case. In that case, the application for automobile insurance stated that none of the drivers listed in the application had ever been arrested for drunken or reckless driving or had his driver's license suspended or revoked. It was admitted that the driver's license of one of the drivers had twice been revoked for reckless driving. The insured had actual knowledge of one of the revocations. The court held that it was a jury question. The court stated:

> "In the light of the evidence the question of whether or not the misrepresentation was made with intent to deceive or defraud clearly was for the jury. We cannot hold that a misrepresentation was made with intent to deceive and defraud unless the evidence is conclusive." (67 N.W. (2d) at 462).

The evidence in this case was far from conclusive that McKinzie had knowledge or understanding of the claimed facts or that he intended to deceive or defraud the insurance company. He considered that he was a resident of the State of California. He was driving with a California driver's license and he did not consider that he had any license to be revoked or sus-

pended in the State of Oregon. He further denied that the driving record introduced by Mayflower was correct.

The jury was entitled to consider these circumstances in evaluating his knowledge and understanding and whether he intended to deceive or defraud the insurance company.

Evidence as to Driving Charges, Citations or Fines in Past Three Years

McKinzie testified that he only had one ticket three years prior to the time that he made the application. The ticket was received in Bell, California, and apparently it was for drag-racing on a motorcycle (Tr. 116-118).

He was asked on direct examination why he did not tell the agent about this ticket when he made his application and he testified "They didn't ask me if I ever had any tickets for speeding or anything." (Tr. 117). He testified that he might have had some tickets in Los Angeles for motorcycles but he considered that a motorcycle was different than an automobile (Tr. 115-116).

The charge of "no muffler" involved his brother-in-law's truck. McKinzie testified that he was driving this truck because his brother-in-law was sick on that particular day (Tr. 131). He testified that he did not have to appear for this charge as it was not his truck and all that his brother-in-law had to do was to show that the truck had been repaired (Tr. 118). He further testified that he did not have to pay any fine in connec-

tion with this charge (Tr. 118). This particular offense would not even appear to be a "driving charge, citation or fine," within the meaning of the application.

This testimony did not conclusively show that McKinzie had knowledge that he was answering the question falsely or that he had any intention to deceive or defraud. More important, a question of fact was certainly presented as to the materiality of these matters.

Evidence as to Other Claimed Misrepresentations

Mayflower contends that McKinzie made a fraudulent misrepresentation in stating in the application that he had not been involved in any automobile accident in the past three years (App. Br. 16, 34). There is absolutely no evidence that McKinzie had any automobile accident within three years prior to the date of the application. McKinzie did not have an automobile accident during this period of time. This question in the application was answered correctly (Tr. 119).

Mayflower further contends that McKinzie falsely and fraudulently stated that he did not have any previous insurers (Tr. 12, 16, 19). McKinzie testified that he previously had insurance and that the word "None" was inserted after question No. 2 in the application because he did not recall the names of the companies (Tr. 119-120). He could not even recall the names of the insurance companies at the time of his deposition (Tr. 121).

The mere fact that this question was answered incorrectly is not conclusive proof of fraud. It is not conclusive proof that the statement was made wilfully with intention to deceive or defraud the insurance company.

Moreover, how could this possibly be conclusive evidence of materiality. There is no evidence that this affected the risk. As a matter of fact, McKinzie had never been refused insurance and he never had a policy of automobile insurance cancelled or refused (Tr. 119).

Evidence Presented Jury Question

Appellant's brief states that this case is unique because all of the evidence which the jury was entitled to consider was presented by appellant's witnesses and exhibits and was introduced on appellant's case in chief and because the facts relevant to the issues submitted to the jury were undisputed as appellees introduced no evidence which would tend to contradict, discredit or weaken this evidence (App. Br. 9).

Mayflower has taken it upon itself to decide what evidence the jury was entitled to consider and what facts were relevant to the issues submitted to the jury. It was the province of the jury to determine the facts. Mayflower has conveniently ignored the possibility that the jury may not have believed its witnesses.

We agree with counsel that this case is unique, not for the reasons assigned by appellant, but because it involves a case where a plaintiff charges fraud, introduces some evidence as to the elements of the fraud and then

claims that its evidence is conclusive upon the jury. The mere statement of such a proposition demonstrates its fallacy.

Mayflower further argues that the defense in this case was grounded upon theories of estoppel, waiver and laches (App. Br. 14-15). This is not correct. The principal defense in this case was a general denial of fraud and this is apparent by the pleadings and by the pre-trial order.

Mayflower further intimates in its brief that Gilmonts in some way waived their general denial in their opening statement to the jury (App. Br. 14). This again is incorrect. Counsel for Gilmonts stated in the opening statement, "We don't believe that Mr. McKinzie was guilty of any fraudulent conduct at the time he took out the insurance and that, of course, you will have to determine from the facts which are presented to you." (Tr. 84). Throughout this case Gilmonts denied that McKinzie was guilty of any fraudulent conduct. Practically all of the requested instructions were based on the issue of fraud.

Gilmonts had no duty to disprove any allegations made by Mayflower. Mayflower was the plaintiff. Mayflower was the one who was claiming fraud and it was the party who had the burden of proving it. It is obvious that Gilmonts could have immediately rested after plaintiff's case and a question for the jury would still have been presented.

Mayflower has cited a number of cases in support of its argument that the evidence conclusively proved

fraud as a matter of law. We do not believe that these cases are applicable. All of the cases cited by Mayflower, except National Life and Accident Insurance Co. v. Gorey, 249 F. (2d) 388 (CA 9, 1957), were cases tried to the court without a jury. Those cases merely stand for the proposition that there was sufficient evidence to sustain the findings of the court.

The only case cited by Mayflower which involved a jury trial is National Life and Accident Insurance Co. v. Gorey, supra. In that case an extensive stipulation was entered into by counsel—wherein, among other things, it was stipulated that the insurance company had relied on the application. In addition, this court applied the law of California and relied strongly on a California case.

Mayflower relies on the case of State Farm Mutual Automobile Ins. Co. v. West, 149 F. Supp. 289 (Md., 1957). That case was tried to the court without a jury and the court found the elements of fraud as a fact. It is obvious that the court was impressed with the testimony of the insurance agent and was not impressed with the insured as a witness. Compare the testimony of insurance agent Snyder in this case (Tr. 136-155).

In this type of case the question of fraud is one of fact to be tried by the jury. Eaid v. National Casualty Co., 122 Or. 547, 259 P. 902 (1927); Willis v. Horticultural Fire Relief, 77 Or. 621, 152 P. 259 (1915); Nielsen v. Mutual Service Casualty Insurance Co., 243 Minn. 246, 67 N.W. (2d) 457 (1954); Cardwell v. United States, 186 F. (2d) 382 (CA 5, 1951); Collins

v. United States, 254 F. (2d) 66 (CA 7, 1958); New York Life Ins. Co. v. Moats, 207 F. 481 (CA 9, 1913).

The Nielsen case, supra, has heretofore been discussed (Br. 17). In that case the insured knew when he signed the application that the driver's license of his son had been revoked for reckless driving. The court held that the question of whether or not the misrepresentation was made with intent to deceive or defraud was clearly for the jury.

In New York Life Ins. Co. v. Moats, supra, the medical examiner for the insurance company was required to state if there was anything which would make the risk undesirable and was generally required to advise the company as to the desirability of the risk. This court held that the character of the risk was mainly determined on the basis of the examination and the report of the doctor and not wholly upon the answers and representations of the applicant. This court held that questions of fact were presented for the jury and were properly submitted to the jury for determination. In the present case the insurance agent was similarly required on the back of the application to either recommend its acceptance or to decline it (Ex. 1).

Cardwell v. United States, supra, is quite similar to the present case. It involved an action by a beneficiary on a National Service Life Insurance policy. The Government contended that the insured had fraudulently procured the reinstatement of the policy by fraudulent representations made in the application for reinstatement. It appeared, contrary to the answers in the appli-

cation, that the insured had previously consulted two physicians. The case was tried to a jury, but at the close of all of the evidence the court held that the evidence was such as to establish all of the elements of fraud as a matter of law and directed a verdict in favor of the Government. The Court of Appeals reversed. The Court stated:

> "In order to justify a directed verdict the evidence must be such that without weighing the credibility of witnesses there can be but one reasonable conclusion as to the verdict. And to void a policy for fraud there must be present in the evidence facts showing that the insured made a false representation, (1) in reference to a material fact, (2) with knowledge of its falsity, (3) with intent to deceive, and (4) with action taken in reliance on the representation. (Citing cases). There can be no doubt as to the falsity of the representation contained in the application for reinstatement, and that action was taken by the Government in reliance thereon. But it is not every false statement that will void an insurance policy. The representation must not only have been untrue, but it must have been in reference to a material matter and knowingly made with knowledge of its falsity and with intent to deceive. And when reasonable men may differ as to whether a representation was material or whether a false answer was made with intent to deceive, those questions must be submitted to the jury. Judging the proof by these standards, we cannot say the evidence preponderates so heavily in favor of the Government as to leave no doubt about the facts or the inferences to be drawn therefrom." (186 F. (2d) at 384-385).

Mayflower had the burden to prove by clear and convincing evidence that material false and fraudulent misrepresentations were knowingly and wilfully made

by the insured with the intention to deceive the insurance company. The credibility of the witnesses was for the jury. Reasonable men could differ as to whether the elements of fraud were present. Mayflower's motion for a directed verdict was properly denied.

II

Failure of McKinzie to Appear Is Immaterial

In specification of error No. 3 Mayflower contends that the trial court erred in denying its motion for a new trial. One of the grounds advanced by Mayflower for a new trial was that a judgment could not be rendered in favor of appellees since they had no greater right than McKinzie, who had defaulted (App. Br. 5).

McKinzie did not file any appearance nor did he appear at the time of trial. Mayflower took his testimony by deposition and introduced portions of it at the trial on the theory that it constituted statements against interest of a *party* (Tr. 98-100). Counsel for Mayflower knowingly failed to move for an order of default at the time of trial after the court had inquired as to whether they were in a position to ask for a default against McKinzie (Tr. 200-202).

The verdict was returned on June 20, 1958 (Tr. 44). Mayflower thereafter moved for a judgment notwithstanding the verdict and for a new trial. Mayflower's motion was denied on November 3, 1958 (Tr. 47). On or about November 21, 1958 Mayflower applied to the court for an order of default against McKinzie (Tr. 49).

Rule 55 (b) (2) of the Federal Rules of Civil Procedure provides in connection with judgments by default by the court that if it is necessary to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper (Br. 4).

At the time of the application for an order of default, the court had already heard the testimony introduced at the time of trial. In addition, the court held a hearing in connection with the proposed default and rendered an opinion (Tr. 50-52; Br. 2). The court held that the failure of McKinzie to appear could in no way defeat what legal claims the defendants Gilmont might have against Mayflower by reason of the insurance policy issued to McKinzie, which the court found to have been in full force and effect as of the date of the accident.

In the pleadings and the pre-trial order Mayflower prayed that the rights of all of the parties, including McKinzie, be declared and determined. Gilmonts joined in the declaration and also prayed for a declaration of the rights of the parties (Tr. 28).

It is clear that there was an actual controversy between Mayflower and Gilmonts. In Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941), the insurance company commenced declaratory judgment proceedings against its insured and one Orteca, who was injured in an automobile accident. Orteca demurred to the complaint on the ground that it did not state a

cause of action against him. The Supreme Court held:

> "That the complaint in the instant case presents such a controversy is plain. Orteca is now seeking a judgment against the insured in an action which the latter claims is covered by the policy, and Secs. 9510-3 and 9510-4 of the Ohio Code . . . give Orteca a statutory right to proceed against petitioner by supplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition. . . . Moreover, Orteca may perform the conditions of the policy issued to the insured requiring notice of the accident, notice of suit, etc., in order to prevent lapse of the policy through failure of the insured to perform such conditions. (Citing cases)." 312 U.S. at 273).

If the jurisdiction of the court to render a declaratory judgment is properly invoked, it is the duty of the court to render a judgment declaring the rights of the respective parties litigant. Central Or. Irr. Dist. v. Deschutes County, 168 Or. 493, 124 P. (2d) 518 (1942). Even if the defendant refuses to file an answer, the court should nevertheless proceed to enter a declaration of the rights of the parties. Central Or. Irr. Dist. v. Deschutes County, supra.

Mayflower had a choice to make the Gilmonts parties to this action or to proceed solely against its insured. If the Gilmonts were joined, they would be barred by the proceedings. If they were not joined, they could not be barred by the proceedings. Having been made parties to Mayflower's case, the Gilmonts obviously had a right to defend.

III

Question of Negligence Properly Submitted to Jury

Mayflower contends that the District Court committed error in failing to give its requested instruction No. 2 (App. Br. 6-7). This requested instruction was properly refused as it instructed the jury to disregard the defense of negligence in determining this case. In addition, the objection to the failure of the court to give this instruction failed to properly direct the court's attention to the claimed error (App. Br. 6-7).

Mayflower contends that error was committed in instructing the jury that Mayflower would not be entitled to be relieved of its obligation under its insurance policy if it was careless and negligent in obtaining and completing the application of insurance (App. Br. 7-8).

The evidence was sufficient to submit this question to the jury. The arrangements to obtain the insurance were made by the owner of the used car lot where McKinzie had purchased his automobile. The owner of the used car lot had called the insurance agent and there was a strong inference that he had furnished considerable information to the agent (Tr. 102, 125). McKinzie testified (Tr. 104);

> "Q. Now, when you came in there did he ask you what your name was?
> A. Yes, uh-huh.
> Q. And your address?
> A. Yes.
> Q. What kind of a car it was?
> A. Uh-huh.

Q. And how much coverage you wanted?
A. Well, he had already known what the car was and Sam had already evidently told him."

Agent Snyder completely filled out the application and also placed a check mark on it indicating where McKinzie was to sign (Tr. 103, 137, 153). The back of the application required the district agent to recommend the applicant and to recommend or decline the application (Ex. 1). Agent Snyder testified that he signed his employer's name to the back of this application and that this was the ordinary and normal practice in the office (Tr. 142-143, 151-152).

The office normally closed at 6:00 P.M. (Tr. 153). The application indicates that the insurance was applied for at 6:00 P.M. (Ex. 1). McKinzie testified that he arrived at the office at 6:00 P.M. (Tr. 125). He further testified that it took about ten minutes to fill out the application (Tr. 126).

Agent Snyder was not acquainted with McKinzie (Tr. 140). He never examined the automobile (Tr. 127), although he stated on the application that he had inspected it (Ex. 1). He never asked McKinzie if he had "any tickets for any speeding or anything" (Tr. 117). He never asked him if he had a license (Tr. 127). Snyder even listed McKinzie's name incorrectly (Tr. 101).

Mayflower also at times made a credit investigation of applicants and obtained a record of the driving experience of applicants (Tr. 168-169). A driving record may be obtained from the State of Oregon for $1.00

(Tr. 169). Mayflower apparently did not make any type of investigation in this case.

The mere fact that the applicant stated that he was 40 years of age and had no previous insurer should have been sufficient to place the insurance company on notice to make further inquiry. As stated in Love v. Metropolitan Life Ins. Co., 99 F. Supp. 641 (E. D. Penn., 1951):

> "If the ambiguity of the answers was such that a reasonably prudent insurer would have undertaken a further inquiry which would have led to a disclosure of the true facts, and none was undertaken, then it is entirely equitable to find the insurer estopped from reliance on the answers given." (99 F. Supp. at 644)

Mayflower further contends that negligence of the Bucholz Agency cannot be imputed to it (App. Br. 43, 48-50). Mayflower never objected to the instructions on these grounds (App. Br. 6-8). At no time during the trial did Mayflower ever contend that its agent lacked authority to represent the insurance company and bind it by its actions.

Snyder had been employed by the Bucholz Agency as Office Manager for two years (Tr. 145). The evidence was clear that the Bucholz Agency was an authorized agent for Mayflower. On direct examination Snyder testified (Tr. 137):

> "Q. In April of 1957 were you employed by the Bucholz Insurance Agency?
>
> A. Yes, I was.
>
> Q. And was that agency an authorized representative of Mayflower Insurance Exchange?
>
> A. Yes, they were."

Mayflower attempts to support its position by citing conditions 19 and 22 of the insurance policy regarding changes in the policy and declarations of the insured (App. Br. 49-50). There has been no attempt to change or waive any conditions of the insurance policy. These particular conditions are immaterial in connection with any question of negligence on the part of the agent. Williams v. Pacific States Fire Ins. Co., 120 Or. 1, 251 P. 258 (1926).

In Hardwick v. State Insurance Co., 20 Or. 547, 26 P. 840 (1891), the insurance company denied the authority of an agent to make a preliminary oral contract for fire insurance. The court stated:

> "An insurance company which clothes a person with authority to hold himself out to the community as its local agent with authority to effect insurance, is bound by the acts of the agent, within the apparent scope of his authority. This authority need not be expressed, but may be implied from circumstances, and may thus exist as to third parties, although not as between the agent and the company." (20 Or. at 561)

Mayflower principally relies on the case of Parker v. Title and Trust Company, 233 F. (2d) 505 (CA 9, 1956) in support of its contention that it had no duty to exercise diligence or due care. The Parker case was tried to the court without a jury and the court made strong findings of fraud. This court held that Parker had "laid a trap" for the title company and further held "Surely a person thus led into a trap owes no duty to the one who did the trapping" (233 F. (2d) at 510). This case is in no way similar to the Parker case.

The Parker case also relied on Howard v. Tettelbaum, 61 Or. 144, 120 P. 373 (1912) and Wolfgang v. Henry Thiele Catering Co., 128 Or. 433, 275 P. 33 (1929). Both of these Oregon cases involved suits for reformation of written instruments and the cases were decided on equitable principles regarding relief from mistake.

The Howard case, supra, pointed out that the defendant was not harmed in the least by the negligence of the plaintiff (61 Or. at 149). The Wolfgang case, supra, actually held that the degree of negligence which will preclude a party from equitable relief depends on the circumstances. The court stated that no bona fide purchaser had become interested in the property and that reformation of the contract would not adversely affect the interests of anyone whose interest should be held immune (128 Or. at 447-448). The court further stated:

> "It is to be observed from the authorities previously reviewed, that at the present time a considerable degree of carelessness will be found excusable if it has not adversely affected some other person whose interest should not be prejudiced by a reformation of the document. Upon the other hand, if the reformation would affect a bona fide purchaser, even a slight degree of negligence will not be excused. It will also be observed, that this court, in harmony with the test written by Pomeroy, has held, that as a general rule the facts of each case will in a large measure, determine the degree of care which the party should have exercised; indeed, the modern authorities give us only one general statement of the standard degree of care; it is, that the laxness must not have violated a positive legal duty owed by the complaining party." (128 Or. at 452)

The rights of innocent third parties, the Gilmonts, are certainly involved in this case. It is also clear that McKinzie is being directly harmed. It is impossible for Mayflower to restore the status quo. McKinzie cannot now obtain insurance which would protect him against liability for the accident of June 8, 1957.

The duty of an insurance company to use due care depends upon the circumstances. In Adriaenssens v. Allstate Insurance Company, 258 F. (2d) 888 (CA 10, 1958), cited by Mayflower, the court stated:

> "The duty to investigate where notice of a fact or facts indicate misrepresentation is a relative one depending upon the particular situation." (258 F. (2d) at 891)

The Oregon Supreme Court has also held that when a person may discover fraud by the use of due diligence in investigating the statements alleged to be false and is afforded ample opportunity to do so but fails to avail himself of it, he cannot avoid his contract on the ground of fraud. Elliott v. Mork, 144 Or. 246, 24 P. (2d) 1036 (1933).

We believe that the correct rule is stated in Williams v. Pacific States Fire Ins. Co., 120 Or. 1, 251 P. 258 (1926) as follows:

> "The insurer will not be permitted to avoid the policy by taking advantage of any misstatement, misrepresentation or concealment, of a fact material to the risk, which is due to the mistake, fraud, *negligence or other fault of its agent* and not to fraud or bad faith on the part of the insured:" (Emphasis added) (120 Or. at 10)

The position of the insurance company in this case is basically inequitable. The loss has occurred; the rights of third parties have intervened; and it is impossible to restore the status quo. Under such circumstances Mayflower should not now be allowed to say that it had "no duty".

CONCLUSION

Mayflower's motion for a directed verdict and its motion for a new trial were properly denied. Mayflower had the burden to prove the elements of fraud by clear and convincing evidence. This was a proper question for the jury.

The district court withdrew the affirmative defenses of waiver, estoppel, laches and the question of whether the insurance company had affirmed its insurance contract. The question of negligence was properly submitted to the jury. This case was fairly tried and the jury was properly instructed. The judgment should be affirmed.

Respectfully submitted,

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No. 16394

United States
COURT OF APPEALS
for the Ninth Circuit

MAYFLOWER INSURANCE EXCHANGE,
Appellant,

vs.

ROBERT DEAN GILMONT, ROSE MARIE GILMONT and RONALD A. WATSON, Guardian ad Litem for Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor and Norman I. Gilmont, a minor,
Appellees.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE WILLIAM G. EAST, District Judge.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-59

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HONORABLE WILLIAM G. EAST, District Judge.

APPELLANT'S REPLY BRIEF

Appellant deems it necessary to briefly comment on the arguments advanced in appellees' brief. To avoid unnecessary reiteration appellant will endeavor to confine its remarks to a consideration of points which were not raised or fully developed in its opening brief.

It is readily apparent from a first reading of appellees' brief that they have failed or refused to recog-

nize the very important distinction between that kind of fraud which entitles a party to the equitable relief of rescission and that kind of fraud which is used as the basis for an action at law for the recovery of damages. This action was commenced by appellant to rescind the insurance contract and to have it declared void *ab initio* and there appears to be no disagreement on either side that this is essentially the nature of the case. Appellees in their brief (Br. 12) state "the question of fraud, misrepresentation and *rescission* should be determined by the law of the State of Oregon, * * * * *" and with this statement appellant can readily concur. Appellant cannot agree, however, that the representations which were made by McKinzie would have to have been "knowingly and wilfully made [by him] with intent to deceive or defraud the insurance company." The Oregon courts have consistently recognized the well established distinction between that fraud which raises an equitable right of rescission and that fraud which is the basis of an action for deceit for the recovery of damages.

Johnson v. Cofer, 204 Or. 142, 281 P. (2) 981 was a suit for rescission of an executed agreement whereby plaintiff conveyed a parcel of real property to defendant in exchange for certain furniture and equipment. One of the grounds of fraud relied upon by plaintiff was defendant's representation that the premises could be used for housekeeping rooms and defendant met this by asserting that plaintiff should not have relied upon this misrepresentation for the reason that they had

some prior knowledge that there had been an objection to that type of occupancy and therefore should have known better. The Oregon Supreme Court in considering this issue stated:

> "The right of rescission does not depend upon fraud intentionally or negligently committed as does an action for deceit. The contract may be vitiated either by a positive fraud actively or negligently practiced, or it may be vitiated if its consummation was accomplished through a completely innocent representation of a material fact which proved false, but was relied upon as true and except for believing in its truth the party would not have entered into the agreement." (Citing Oregon cases.)

The distinction is again recognized in *Amort v. Tupper*, 204 Or. 279, 289, 282 P. (2) 660 wherein the court stated:

> "While a court of equity follows the law, and will not permit the recovery of damages for fraud where the fraud is not consciously committed, 'whatever would be fraudulent at law will be so in equity; but the equitable doctrine goes further and includes instances of fraudulent misrepresentations which do not exist in the law.' 3 Pomeroy's Equity Jurisprudence, 5 Ed. 487, Sec. 885. For example, a court of equity will grant rescission of a contract even though there is fraud not intentionally or recklessly practiced. A completely innocent representation of a material fact, which, if false, but relied upon, and in fact accomplished a fraud, is all that is necessary." (Citing Oregon cases.)

Moreover, this court, in *Bankers Union Life Ins. Co. v. Montgomery*, 261 F. (2) 852, recognized the distinction drawn in Oregon between the necessity of showing wilful falsity with regard to answers pertaining

to physical conditions and mere falsity with respect to answers naming doctors who have treated the applicant. The reason for the distinction in Oregon is set forth in *Mutual Life Ins. Co. of N. Y. v. Chandler*, 120 Or. 694, 252 P. 559, wherein the court states:

> "The reason of this is that many times a person may be afflicted with a disease, at least in its incipient stages, without being aware thereof and may answer in good faith that he has not had any such disease. The representation, however, that he has not consulted or been treated by any other physician is one peculiarly within his knowledge and the law requires in such a case the utmost good faith and full disclosure in answer to direct inquiries on the part of one making an application for the policy."

Likewise in the instant case the information which was sought by questions in the application was peculiarly within McKinzie's own knowledge. Certainly he could not have been unaware of the fact that his license had been suspended, of the names of previous insurers, or of driving charges, citations or fines which he had received in the past three years. These statements "related to a matter forming the very basis or foundation of the contract, and worked a legal fraud on the company whether applicant intended to do so or not." *Lewis v. New York Life Ins. Co.*, 201 Mo. App. 48, 209 S.W. 625, cited in *Mutual Life Ins. Co. of N. Y. v. Chandler*, supra.

For the purpose of answering the arguments of appellees in an orderly fashion appellant will employ their subheadings.

Evidence as to Whether Application Was Delivered to McKinzie

Appellees have now raised for the first time the contention that appellant was not entitled to rely on the statements made in the application on the grounds that a copy of the application was not delivered to McKinzie. On the basis of the record in this case it is obvious that this argument is not only untenable but it comes too late.

A photostatic copy of the application was attached to the original complaint as an exhibit (R. 8); the original copy of the application bearing McKinzie's signature at the foot was introduced into evidence as Plaintiff's Exhibit 1 without objection (R. 86); the witness Snyder testified on direct examination (R. 142) and on cross examination (R. 143-144) that he delivered a copy of the application to McKinzie; and McKinzie himself testified in his deposition as follows:

> "Q. After he took the application and your money, did he give you a receipt for the money?
> A. Oh yes.
> Q. And a copy of the application?
> A. That's right.
> Q. Sometime after that did you get the policy?
> A. That's right.
> Q. Do you still have the policy?
> A. That is correct.
> Q. You still have the application?
> A. That is correct." (R. 122)

> "When a party to an action or suit stipulates or testifies deliberately to a concrete fact, not as a matter of opinion, estimate, appearance, inference, or uncertain memory, but as a considered circumstance of the case, his adversary is entitled to hold

him to it as a judicial admission. If no mistake is claimed or shown, the party so stipulating or testifying to a concrete fact cannot have the benefit of other evidence tending to falsify it. *Valdin v. Holteen and Nordstrom,* 199 Or. 135, 144, 260 P. (2) 504; Note 169 ALR 798, 800." *Morey v. Redifer,* 204 Or. 194, 214; 282 P. (2) 1062.

Evidence as to Driver's License

Appellees dwell at some length in their brief upon the matter of whether or not McKinzie had an Oregon or a California driver's license and whether or not he could have secured an Oregon driver's license at the time of the application. Whether or not McKinzie had a driver's license at the time of the application is completely beside the point for the reason that the information which was sought by the questions put to him was concerned with whether or not his license had ever been suspended or revoked. While appellees attempt to draw a distinction between the two motor vehicle driving records furnished by the Oregon Motor Vehicle Department (Ex. 7 and 35), it is nonetheless conceded by them that both of these records clearly showed that McKinzie had been suspended on February 14, 1956, and this point is admitted by appellees in their brief (Br. 15).

Assuming for the purpose of argument that prior to February 1956 McKinzie had not received any notice, or if he had received notice he had forgotten, that his Oregon driver's license had been suspended, nonetheless it is clear from his testimony that in February 1956 he applied for an Oregon driver's license and was then

advised that his driving privileges in Oregon would be suspended until February 14, 1957. McKinzie admitted that he had been so advised (R. 112) and while he may then have felt that the State of Oregon was doing him an injustice in refusing to grant him a license and in suspending his driving privileges, nonetheless he did not contend that he had forgotten this incident. To the contrary it is more likely to assume that the suspension made a distinct impression on him because he considered it a "bum rap." This was the specific information which was sought by Question 1 (c) of the application and no place in his testimony does he give any satisfactory explanation as to why he concealed this fact.

Evidence as to Driving Charges, Citations Or Fines in Past Three Years

The documentary evidence reported by the transcripts of the driving record from Oregon and California stands uncontradicted and conclusively established the misrepresentations relating to McKinzie's driving record. Appellees' attempt to weaken this evidence consists only of references to McKinzie's testimony which were taken out of context. These portions of McKinzie's testimony upon which appellees base their argument show nothing more than that when his deposition was taken he was still making clumsy efforts to evade the truth.

Evidence as to Other Claimed Misrepresentations

Appellees' brief (Br. 19) points out a mistake which appellant has made in its brief concerning the state-

ment in the application relating to automobile accidents in the past three years. Appellant admits that this was an inadvertent reference and no contention should be made that any misrepresentation was made concerning any automobile accident. Appellees are correct in bringing this matter to the attention of the court and appellant joins with them in correcting the record on this point.

Evidence Presented Jury Question

Appellees have suggested that the jury in considering its verdict "may not have believed its witnesses" (Br. 20). It should be kept in mind that the only witnesses who testified concerning the facts relevant to the issues submitted were McKinzie and the witnesses Snyder and Carlson. McKinzie admitted that he gave the answers as set forth in the application, Snyder testified that he in turn correctly put them down, and Carlson testified that if the true state of facts had been known to appellant the policy would not have been issued. There was no evidence received or offered to the contrary and if the jury didn't believe these witnesses then its verdict was based upon speculation and not on the evidence.

McKinzie made no contention that he told the truth to Snyder and that Snyder failed, for one reason or another, to put down the correct answers. The facts as presented to the jury clearly and conclusively showed that McKinzie gave false answers and in reliance on them appellant issued its policy. Under these facts appellant is clearly entitled to the relief of rescission. As

this court stated in *National Life and Accident v. Gorey,* 249 F. (2) 388:

> "As a matter of law, the evidence in this case shows that the deceased by incorrect and untrue answers misrepresented and concealed material facts; that defendant relied on such misrepresented facts, and issued its policy in reliance thereon. Because of this, the defendant's motion for a directed verdict or for a judgment n.o.v., should have been granted by the trial court." (Citations omitted)

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT COMMON LAW NEGLIGENCE WAS A DEFENSE

Appellees contend that appellant failed to properly object to the failure of the court to give appellant's Requested Instruction No. 2 wherein appellant requested the court to instruct the jury not to consider the defense of negligence, but tacitly admits that appellant made a proper objection to that instruction of the court wherein the court advised the jury that common law negligence on the part of the Bucholz Agency would bar a verdict in favor of appellant. The rules of this court requiring specification of error be set forth totidem verbis together with the grounds of objection urged at the trial are for the purpose of allowing this court to determine without going through the objections to the instructions page by page that the trial court was properly advised of the objection either to instructions refused or to instructions given, or a combination of both. It is possible that from a technical standpoint the objection to the failure to give appel-

lant's Requested Instruction No. 2 set forth on pages 6 and 7 of its brief should also have included the objections that appellant made to the trial court's instructing the jury that common law negligence was a defense as set forth on page 8 of appellant's brief. However, this would simply be a reiteration of the same words and it is perfectly clear from a consideration of Specification of Error 4 and 5 that the court was fully advised that appellant objected to the submission to the jury of the question of common law negligence on the part of appellant and the reasons therefor.

Appellees challenge appellant's position that the authority of the Bucholz Agency was limited to soliciting applications for insurance and accepting premium deposits, and in support thereof picked out one question and one answer from the testimony of the witness Snyder wherein he in effect stated that the Bucholz Agency was "an authorized representative of Mayflower Insurance Exchange" and totally ignored all other testimony in the case as to the limited extent of the agency. The entire testimony clearly shows that the Bucholz Agency was "an authorized representative" but that the authority was a limited one and the burden of showing otherwise was on appellees. Appellees then go on to state that conditions 19 and 22 of the insurance policy (Ex. 3) have no application in determining the question of negligence on the part of appellant as appellees are not attempting to change or waive any condition of the insurance policy. This is not correct, for, as pointed out in *Comer v. World Insurance Co.*, 212 Or. 105, 318

P. (2d) 916, under a provision comparable to condition 19 the Oregon Supreme Court stated at p. 120-121:

> "The plaintiff made no effort to prove that Dayton's authority included power to write the type of policy which he claimed he possessed; that is, one covering an applicant who, in the last five years, had received medical and hospital treatment."

In our case there is no testimony that the Bucholz Agency had authority to write a policy covering an applicant who had had his driver's license suspended and had the record of traffic violations that McKinzie did. Then appellees go on to contend that appellant itself was put on notice that there was "an ambiguity" in the answers given by McKinzie which placed it on notice to make further inquiry because applicant stated he was 40 years of age and had had no previous insurance. This is the only answer in the application (Ex. 1) which appellees contend constituted notice to appellant of irregularity and occasioned the duty to make further inquiry. Obviously, there is nothing ambiguous nor is there anything startling in the fact that the applicant had had no previous insurance carrier. A similar argument was made by the beneficiary in the case of *National Life Ins. Co. v. Corey,* 249 F.(2d) 388 (Ninth Circuit). In that case the insured was 31 years old when he made out his application and in it he answered "none" to the question, "State names and addresses of physicians which you have ever consulted." It was there argued that the company waived the inaccurate reply by not further investigating the answer to this question on the basis that no one is in such per-

fect health as to "never have ever" consulted a physician. This court in answering this argument stated:

> "While thirty-one years of perfect health would be remarkable, the failure to consult a doctor in thirty-one years is not unheard of, nor an impossibility. Nor does such an answer imply that it must be, or is, false."

Likewise in the instant case the fact that McKinzie, at age 40, represented that he had not had his license revoked or suspended or had not had any driving charges, citations or fines in the previous three years would not be unusual, an impossibility or an implication that his answers were false. It is much more reasonable to assume that McKinzie would have given truthful answers as there would be no reason for him to misstate the facts unless he was intentionally deceiving the company for the purpose of securing an automobile liability policy.

Appellees cite as the correct rule applicable to this case one sentence from *Williams v. Pacific States Fire Co.*, 120 Or. 1, 251 P. 258, as follows:

> "The insurer will not be permitted to avoid the policy by taking advantage of any misstatement, misrepresentation or concealment, of a fact material to the risk, which is due to the mistake, fraud, negligence or other fault of its agent and not to fraud or bad faith on the part of the insured:"

As far as the above quotation is concerned it may be under certain circumstances a correct statement of a rule of law but this one sentence taken out of context has no application to the facts in this case. In the Wil-

liams case there was no controversy as to the fact that the prospective assured had orally given the correct information requested by the agent. There was no application form signed by the prospective assured and the "agent" in procuring the insurance policy gave incorrect information to the issuing company. The assured never saw the policy and had no knowledge of the false statements made by the "agent" to induce the issuance of the policy in question until after the loss. When the assured brought action on the policy the insurance company set up as a defense the false statements made by the "agent" to induce the issuance of the policy. The assured then contended that the insurance company was estopped from claiming the false representations contained in the policy would render the policy void because any error or oversight in making these representations was made by its agent. The main controversy then resolved itself into whether the "agent" was the agent for the assured or the agent for the insurance company, and the jury resolved this question in favor of the assured. This case was therefore decided on the doctrine of estoppel *in pais* which prevented the insurance company from disproving the truth of the statements made by its authorized agent in making up the application for insurance.

> "The defendant company is estopped from claiming that any error or oversight of A. D. Trunkey, or Lamping & Company, acting as its agent, in making the representations or warranties contained in the policy, would render the policy void. A contrary holding would open wide the door to fraud and permit an insurer by having its agent

> insert in a policy of insurance erroneous statements without the knowledge or assent of the assured to collect the premiums and render it optional with the insurance company to pay any loss occurring. The law does not sanction such a rule." (P. 10)

The distinction between the rule which applies where the agent through mistake, fraud, negligence or other fault makes a misstatement in the application unknown to the prospective assured and the rule where the applicant gives the agent a false statement of the facts which the agent correctly sets forth in the application form is recognized in *Tri-State Ins. Co. v. Ford*, 120 F. Supp. 118, which case incidentally answers nearly every contention raised by appellees. In the Tri-State case the policy in question contained provisions identical with those contained in Exhibit 3. The false representation was that no policy of insurance had been cancelled during the previous year. The court found that the insurance company did not discover that this statement was false until after an accident, that the local soliciting agent was guilty of negligence in not verifying the truthfulness of this representation since he knew facts that should have put him upon inquiry, namely, that the applicant had come all the way from another town to do business and the agent had read a letter from the prospective mortgagee, also to be covered by the policy for loss by collision, to the applicant stating that its file showed the collision coverage had been cancelled by an insurance company. At p. 122 the court stated:

> "The plaintiff company, on whom the fraud was practiced, had no *actual* knowledge of the mis-

representation and cannot be deemed to have waived this material risk element and to have knowingly entered into the contractual arrangement. Although, admittedly the plaintiff's soliciting agent had facts which upon inquiry would have revealed the truth the plaintiff company cannot be bound by the agent's failure to inquire inasmuch as this soliciting agent was not clothed with ostensible authority to waive a matter so material to the risk, even if said agent had possessed *actual* and not merely *constructive* notice himself. The insured cannot be purged from his own fraud upon the rationale that the plaintiff thhrough its soliciting agent engaged in conduct which in legal fiction amounted to a waiver of a material warranty by the insured *when the agent accepted* the premium payments. The case at bar must be sharply distinguished from those lines of cases wherein the agent of the insurer in order to write the policy either mistakenly or fraudulently fills in an insurance application warranty when the warranted representation material to the risk was in fact truly and accurately stated by the prospective insured. Obviously, where the applicant in the utmost of good faith truthfully states all facts pertinent to inquiry and pays his premium with the understanding that the policy has been accepted by the insurer, any negligent or fraudulent conduct on the part of the agent must be imputed to the insurance company and not to the insured."

In *Comer v. World Ins. Co.*, supra, we have the same situation as in *Williams v. Pacific States Fire Co.*, supra, namely, the agent in an application form for a policy of health and disability insurance wrote down words relative to the prior physical condition of the applicant which were false. The assured sued on the policy, the insurance company pleaded as a defense the

false representations made in the application, and the assured then contended that the insurance company was estopped to resort to the truth in defending itself because (1) the assured had told the agent the truth about his illness; (2) the agent made false entries in the application form without the assured's knowledge; (3) the insurance company delivered the policy to the assured as a valid contract of insurance; and (4) the assured paid the premiums in good faith and relied upon the policy. The verdict was for the plaintiff-assured and on appeal the Oregon Supreme Court held that in the light of ORS 736.305 (quoted in full in appellees' brief p. 5), the pertinent portion of which is set forth for convenience as follows:

> "Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made a part of the insurance contract. In that case, if the company delivers a copy of such application to the assured, thereupon such application shall become a part of the insurance contract. If the application is not so delivered to the assured, it shall not be made a part of the insurance contract."

the plaintiff-assured was charged with knowledge of the contents of the application and there was no basis for the equitable estoppel which the assured sought to invoke. "To the contrary, it showed that the policy was obtained by false representations and that the defendant's motion for a directed verdict should have been sustained." (P. 131) There was a concurring opinion in which the minority held that the decision was cor-

rect either on the ground that there was no pleading of estoppel or that the assured had admitted that he did give at least one false answer to the agent, but disagreed with the majority holding that the assured was bound by the false declarations even though he claimed that he was not aware thereof, as according to the minority this was in effect holding that the assured was guilty of fraud even though he might not have known that the answers on the application were false. The important point is that the defense of estoppel based on the fraud, mistake or negligence of the agent in preparing the application form could not be asserted by the assured where a copy of the application was furnished the assured, as in our case, according to the majority opinion, while the minority opinion would limit estoppel to those cases where the agent by fraud, mistake or negligence incorrectly wrote down the answers and the applicant did not know of the false answers. It may be argued that a distinction should be made between the cases where the "negligence" of the agent was in incorrectly writing down the answers and those cases in which the insurance company had actual knowledge of a situation which would put it on notice that the answers given were false, but this seems to appellant a distinction without a difference, and in the absence of actual knowledge by the insurance company would allow the wrongdoer to profit by his own wrong. In any event, common law negligence is not a proper defense and the instruction of the court cannot be tortured into an instruction dealing with estoppel *in pais*. Further, appellees are up against a stone wall in at-

tempting to profit by McKinzie's fraud. See *Johnson v.* Cofer, 204 Or. 142, 281 P.(2d) 981, where in an equitable action for rescission the court stated at p. 149:

> "It is a well established principle of law that in order to secure relief on the ground of fraud, the person claiming reliance must have had a right to rely upon the representations. Generally speaking, the right to rely on representations presents the question of the duty of the party to whom the representations have been made to use diligence in respect to those representations. The courts are not entirely in accord as to the necessity of diligence at all where fraud has been employed, especially where representations are of a positive nature. 'The policy of the courts is, on the one hand, to suppress fraud and, on the other, not to encourage negligence and inattention to one's own interests. The rule of law is one of policy. Is it better to encourage negligence in the foolish, or fraud in the deceitful? Either course has obvious dangers. But judicial experience exemplifies that the former is the less objectionable and hampers less the administration of pure justice. The law is not designed to protect the vigilant, or tolerably vigilant, alone, although it rather favors them, but is intended as a protection to even the foolishly credulous, as against the machinations of the designedly wicked. It has also been frequently declared that as between the original parties, one who has intentionally deceived the other to his prejudice is not to be heard to say, in defense of the charge of fraud, that the innocent party ought not to have trusted him or was guilty of negligence in so doing.' 23 Am. Jur. 948, Fraud and Deceit, Sec. 146. See also *Larsen et al. v. Lootens et al.,* 102 Or. 579, 194 P. 699, 203 P. 621."

In further support of their contention that the instruction on common law negligence was proper ap-

pellees cite *Elliott v. Mork*, 144 Or. 246, 24 P.(2d) 1036. This case states a rule of limited application, namely, in relation to the sale or exchange of real property, and is not pertinent to our inquiry, for, as stated in *Tri-State Ins. Co. v. Ford*, supra, at p. 122:

> "Although there is a rule, applicable particularly in the law of sales, that where the one on whom the alleged fraud was perpetrated, knew or could have known of the fraud, said person cannot urge the misrepresentation in order to vitiate the contract between the parties, such rule has no application in the instant case."

Appellant again reiterates that it was entitled to a directed verdict, having conclusively proved all elements entitling it to rescind the insurance contract, and further that in the event this court is of a contrary opinion that appellant is certainly entitled to a new trial because of the erroneous instruction relative to common law negligence.

Respectfully submitted,

VOSBURG, JOSS, HEDLUND & BOSCH
ARTHUR S. VOSBURG
FRANK MCK. BOSCH

Attorneys for Appellant
909 American Bank Building
Portland 5, Oregon

No. 16394

United States
Court of Appeals
for the Ninth Circuit

MAYFLOWER INSURANCE EXCHANGE,
Appellant,

vs.

ROBERT DEAN GILMONT, ROSE MARIE GILMONT and RONALD A. WATSON, Guardian ad Litem for Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor and Norman I. Gilmont, a minor, Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—6-18-59

No. 16394

United States
Court of Appeals
for the Ninth Circuit

MAYFLOWER INSURANCE EXCHANGE,
Appellant,

vs.

ROBERT DEAN GILMONT, ROSE MARIE GILMONT and RONALD A. WATSON, Guardian ad Litem for Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor and Norman I. Gilmont, a minor, Appellees.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Transcript of Proceedings—(Continued):

NAMES AND ADDRESSES OF ATTORNEYS

ARTHUR S. VOSBURG,
FRANK McK. BOSCH,
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Attorneys for Appellant.

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& KENNEDY,
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HOLLIE PIHL,

916 Portland Trust Building,
Portland 4, Oregon,

Attorneys for Appellees.

In the District Court of the United States
for the District of Oregon

No. Civil 9405

MAYFLOWER INSURANCE EXCHANGE,
Plaintiff,

vs.

ARTHUR ALLEN McKINZIE, ROBERT DEAN GILMONT, ROSE MARIE GILMONT, SUSAN ROSE GILMONT, ROBERT RUSSELL GILMONT, and NORMAN L. GILMONT,
Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

Comes now the plaintiff and for its complaint for declaratory judgment alleges:

I.

That plaintiff is a corporation duly organized and existing under the laws of the State of Washington and all of the defendants are citizens of the State of Oregon. That the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

That defendants Robert Dean Gilmont and Rose Marie Gilmont are husband and wife and the defendants Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont are their minor children.

III.

That on or about April 16, 1957 at Portland, Oregon, defendant Arthur Allen McKinzie made application to the plaintiff for a policy of insurance covering defendant Arthur Allen McKinzie in the operation of a certain 1951 Cadillac coupe automobile, motor No. 516262287, Oregon license #4G-2710, and insuring against public liability for personal injuries arising out of the operation of said automobile with limits of $10,000.00 for injuries to any one person and $20,000.00 for injuries arising out of any one accident, and against property damage with limits of $5,000.00. That a copy of said written application is attached hereto marked "Exhibit A" and by this reference made a part hereof as if fully set forth herein. That subsequent to receipt of and in reliance upon the statements and representations made in the written application of defendant Arthur Allen McKinzie for said insurance (Exhibit A), the plaintiff issued to him a certain policy of insurance No. 174380, a copy of which is attached hereto marked "Exhibit B" and by this reference made a part hereof as if fully set forth herein.

IV.

That on or about June 8, 1957, at a point on U. S. Highway No. 20 about 6.5 miles East of Toledo, Oregon, in the State of Oregon, the defendant Arthur Allen McKinzie, while operating said motor vehicle covered by said insurance policy, was involved in a collision with an automobile owned and operated by defendant Robert Dean Gilmont,

said collision resulting in personal injuries to defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont, and damage to the automobiles owned respectively by the defendants Arthur Allen McKinzie and Robert Dean Gilmont.

V.

That defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont have retained an attorney and are demanding that defendant Arthur Allen McKinzie and plaintiff respond in damages for the injuries sustained by said defendants; that defendant Arthur Allen McKinzie is claiming that plaintiff is obligated under the terms of said policy, Exhibit B, to provide a defense for said defendant in any action that may be brought against him for damages arising out of the aforementioned accident and to pay any judgment that may be rendered against him within the limits of said policy.

VI.

That during the course of investigating said accident plaintiff discovered that defendant Arthur Allen McKinzie had made misrepresentations to the plaintiff in his application for said insurance (Exhibit A) in that he had answered in the negative questions as to whether his driver's license had been revoked or suspended and whether he had received any driving charges, citations or fines in the three years prior to the date of his application for

said insurance. That in truth and in fact the defendant Arthur Allen McKinzie's driver's license had been suspended in the State of Oregon under date of February 14, 1956 for a period of one year and on February 14, 1957 this one-year suspension was continued for an additional period of one year from that date, and that said driver's license had not been reinstated in the State of Oregon at the time defendant Arthur Allen McKinzie made application for said insurance. That in truth and in fact defendant Arthur Allen McKinzie was convicted in the District Court of the State of Oregon, County of Benton, on February 14, 1956 for the traffic offense of "no muffler".

VII.

That plaintiff would not have issued the aforementioned policy of insurance (Exhibit B) had it known the true state of facts and if the defendant Arthur Allen McKinzie had correctly answered the questions put to him on said written application (Exhibit A). That as soon as the plaintiff learned of the aforementioned fraudulent representations of the defendant Arthur Allen McKinzie it notified defendant Arthur Allen McKinzie of its decision to rescind the policy issued to him as of the date of issue and tendered its check in full refund of all premiums paid thereon.

VIII.

That plaintiff contends that no valid policy of insurance has ever been issued by it to defendant

Arthur Allen McKinzie; that the purported policy of insurance Exhibit B, was null and void and of no force and effect and that plaintiff is not obligated to provide a defense for defendant Arthur Allen McKinzie in any action that may be brought against him or to pay any judgment that may be rendered against him arising out of or connected with the aforementioned accident of June 8, 1957.

Wherefore, plaintiff prays for a declaratory judgment as follows:

1. That policy No. 174380 issued by plaintiff as of April 16, 1957 was null and void as of the date of its issue.

2. That plaintiff is under no duty or obligation to defend defendant Arthur Allen McKinzie in any action, suit or proceeding that may be instituted against him for damages arising out of an accident occurring June 8, 1957 at a point on U. S. Highway No. 20 about 6.5 miles East of Toledo, Oregon.

3. That plaintiff is under no duty and is not obligated to pay any judgment that may be rendered against defendant Arthur Allen McKinzie arising out of the aforementioned accident.

/s/ ARTHUR S. VOSBURG,
/s/ FRANK McK. BOSCH,
Attorneys for Plaintiff.

Mailed 4-17-57

AGENT'S COPY

MAYFLOWER INSURANCE EXCHANGE
SEATTLE, WASHINGTON
DECLARATIONS

TYPE	STATE	DIST	AGENT	YEAR	CC
1	2	1	1	1	

HOME OFFICE USE ONLY

Policy Number 174380

DPC AC

NAME OF APPLICANT Arthur A. McKenzie

ADDRESS 4619 S.W. View Point Terr. Portland

OCCUPATION Welder

Except with respect to bailment lease, conditional sale, mortgage or other encumbrance, the applicant is the sole owner of the automobile except as herein stated

POLICY PERIOD FROM 4-16-57 TO 10-16-57
AT 12:01 A.M., STANDARD TIME, AT THE ADDRESS OF THE APPLICANT STATED HEREIN.

LIMITS OF LIABILITY	PREMIUM DEPOSIT	INITIAL FEE	BILLING CODES
A—Bodily Injury $10,000 each person $20,000 each accident B—Property Damage $5,000 each accident	30 44	1 00	
C & D—Fire and Theft Actual Cash Value			
E—Comprehensive Car Damage (Including Fire & Theft) Actual Cash Value	0 40	.50	
F—1 Collision or Upset Actual Cash Value Less $50 Deductible	22 50	.50	
F—2 Towing and road service			
G—Medical Expense $ each person			
Other Coverage			
ACCIDENTAL DEATH and DISABILITY? (Use Line Above to Indicate Coverage) TOTAL→	58 14 2 00		

DESCRIPTION OF VEHICLE

Year 1951 Cyls. 8
Make Cad
Model
Body Type Cpe
Motor No. 51626287
Serial No.
Purchase Date 4-16-57
New or Used Used
Purchase Price $1390 00

Any loss under Coverages C and D, E and F-1 is payable to the named insured and such persons as are named hereafter, if any, as their interest may appear City Finance Co 534 L.E. Morrison
MORTGAGEE NAME AND ADDRESS
Portland Ore

APPLICANTS STATEMENT

(Under No Circumstances will the Exchange be bound unless all questions below have been answered)

1. Have you or ANY DRIVER of this car—
   (a) any physical impairment? No
   (b) had auto insurance cancelled or refused? No
   (c) had license revoked or suspended? No
   (d) received any driving charges, citations or fines (not parking) in past 3 years? No
   (e) been involved in any auto accident as a driver in past 3 years? No
2. Name of previous Insurer none Policy Number
3. Name and address of Employer Pay & Pay Trunk Equipment Co. Portland
4. The vehicle is) (is not) used in the duties of my present occupation.
5. The following are the only other drivers of this vehicle living in the household:

NAME	AGE	RELATIONSHIP	% OF DRIVING	SINGLE OR MARRIED?
none				

6. How long have you known Agent? New
7. Did Agent inspect vehicle? yes
8. Any unrepaired damage noted? No
9. I am (single) (married)
10. My age is 40 and birthdate
11. How many cars in the household? one
12. If vehicle not garaged at above address, state where
13. How long living at present address? 2 years
    If less than a year, previous addresses:

In consideration of the benefits to be derived therefrom the subscriber agrees with Mayflower Insurance Exchange and other subscribers thereto through Mayflower Underwriters, Inc., their attorney-in-fact, to exchange with all other subscribers policies of insurance or reinsurance in such form as may be specified by said attorney-in-fact and approved by the Board of Governors or its Executive Committee for any loss insured against, and subscriber appoints Mayflower Underwriters, Inc. to be attorney-in-fact for subscriber, with full power of substitution, granting it power in subscriber's name, place and stead to do all things which subscriber might or could do, severally or jointly, with reference to all policies issued, including cancellation, collection and receipt of monies due to the Exchange, disbursement of loss and expense payments to effect reinsurance, and perform all other acts incidental to the management of the Exchange and the business of inter-insurance; the maximum amount to be paid to Mayflower Underwriters, Inc. as compensation for its services shall be the membership fees and twenty-five per cent of all premiums. Said attorney is empowered to accept service of process on behalf of the Exchange and to authorize insurance commissioner of any state to receive service of process in actions against the Exchange upon contracts of inter-insurance. Reserves and general surplus remaining after payment of losses and expenses out of the remaining portion of premium received shall be invested and reinvested by the attorney-in-fact, subject to the approval as to such investments by the Board of Governors or its Executive Committee. Expenses payable from said remaining deposits and continuing premiums shall include all taxes, license fees, attorney's fees, adjustment expenses and charges, expenses of members' and Governors' meetings, agents' commissions, and such other specified fees, dues and expenses as may be authorized by the Board of Governors. All other expenses incurred in the conduct of the business and such of the above expenses as may be agreed upon between Mayflower Underwriters, Inc. and the Board of Governors or its Executive Committee shall be borne by Mayflower Underwriters, Inc. The subscriber agrees to be liable severally for a contingent liability which shall not be more than a sum equal to one premium deposit, which contingent assessment liability shall apply only to actual losses and expenses incurred during the time that the policy of insurance shall have been in force.

This agreement can be signed upon any number of counterparts with the same effect as though the signatures of all subscribers were upon the same instrument, and shall be binding upon the parties severally and ratably as provided in the policies issued. The word "subscriber" as used herein shall mean members of the Exchange, the subscriber hereto, and all other subscribers to this or any other like agreement.

I declare the facts within the applicants statement to be true and request the Exchange to issue the insurance in reliance thereon. I understand the insurance will in no event become effective prior to the time and date actually applied for, as indicated below.

Applied for 6:00 PM (TIME) 4 (MONTH) 16 (DAY) 1957 (YEAR)

A.A. McKenzie (SIGNATURE OF APPLICANT)

EXHIBIT A

CO

EXHIBIT "B"

Mayflower Insurance Exchange

2717 Third Avenue • Seattle, I. Washington

DECLARATIONS

NAMED INSURED

ARTHUR A MC KINZIE
4619 SW
VIEW POINT TERR
PORTLAND ORE

POLICY NUMBER

174380

Policy period shown below to be effective 12:01 A.M. Standard Time, but in no event prior to the date and hour actually applied for; at the address of the named insured as stated herein and additional terms of six calendar months each for which the required premium is paid.

The insurance afforded is only with respect to such, and so many of the following coverages as are indicated by specific Premium Deposit charge or charges. The limit of the Exchange's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

POLICY PERIOD FROM	TO	ACCT. CODE	TYPE	ST.	DIST.	LOCAL AGENT	TERR.	C. C.	D. P. C.
4 1657	10 1657	11		2	01	1	1	102	40575105

BI - PD PER LIMITS STATED BELOW	FIRE & THEFT ACTUAL CASH VALUE	COMPREHENSIVE INCL FIRE & THEFT ACTUAL CASH VALUE	COLLISION PER CODE BELOW ACTUAL CASH VALUE	TOWING AND EXTENDED COVERAGE	OTHER PER ENDORSEMENTS	MEDICAL PER LIMITS STATED BELOW	FILING FEE	INITIAL MEMBERSHIP FEE	TOTAL PREMIUM INCLUDING MEMBERSHIP FEE
3024		540	2250					200	$ 6014

COVERAGES AND LIMITS OF LIABILITY

BODILY INJURY		PROPERTY DAMAGE	COLLISION TYPE PER CODE BELOW	MEDICAL PAYMENTS
$ 10,000 each person	$ 20,000 each occurrence	$ 5,000 each occurrence	2	each person $

COLLISION CODES:
(1) $25 DEDUCTIBLE (2) $50 DEDUCTIBLE (3) $100 DEDUCTIBLE (4) $250 DEDUCTIBLE (5) $500 DEDUCTIBLE (6) $1000 DEDUCTIBLE (7) 20/80 % - $50 MAXIMUM

AUTOMOBILE DESCRIPTION YEAR	TRADE NAME	BODY TYPE	
51	CAD	CPE	
MOTOR OR SERIAL NO.		NAMED INSURED IS INDIVIDUAL, CORPORATION OR PARTNERSHIP	
316262287		IND	

The automobile described is unencumbered except as herein stated: Any loss under Coverages C, D, E and F-1 is payable as interest may appear to the named insured and

CITY FINANCE CO
534 SE MORISON
PORTLAND ORE

Except with respect to bailment lease, conditional sale, mortgage or other encumbrance, the named insured is the sole owner of the automobile except as herein stated.

APR 24 1957

COUNTERSIGNED

E-151 REV 7-1-56 Per Policy EXHIBIT B

MAYFLOWER INSURANCE EXCHANGE. (an insurance exchange, herein called the Exchange), agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the membership fee and the premium deposit and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. **COVERAGE A. Bodily Injury Liability.** To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accidental occurrence and arising out of the ownership, maintenance or use of the automobile.

COVERAGE B—Property Damage Liability. To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, caused by accidental occurrence and arising out of the ownership, maintenance or use of the automobile.

COVERAGE C—Fire, Lightning and Transportation. To pay for direct and accidental loss of or damage to the automobile, hereinafter called loss, caused (a) by fire or lightning, (b) by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the automobile is located, or (c) by the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the automobile is being transported on land or on water, including general average and salvage charges for which the insured is legally liable.

COVERAGE D—Theft. To pay for loss of or damage to the automobile, hereinafter called loss, caused by theft, larceny, robbery or pilferage.

COVERAGE E—Comprehensive. To pay for any direct and accidental loss of, or damage to the automobile hereinafter called loss, except loss caused by collision of the automobile with another object or by upset of the automobile or by collision of the automobile with a vehicle to which it is attached. Loss, including breakage of glass, caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset.

COVERAGE F-1—Collision or Upset. To pay for any direct and accidental loss of or damage to the automobile, hereinafter called loss, caused by collision of the automobile with another object or by upset of the automobile, but only for the amount of each such loss in excess of the deductible amount, if any, stated in the declarations as applicable hereto.

COVERAGE F-2—Towing-Road Service. To pay for towing and labor costs necessitated by the disablement of the automobile, provided the labor is performed at the place of disablement and provided such disablement occurs on the road outside the limits of the insured's premises.

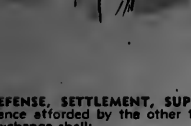
COVERAGE G—Medical Payments. To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, ambulance, hospital, professional nursing and funeral services, to or for each person who sustains bodily injury, sickness or disease, caused by accident, while in, entering or alighting from the automobile if the automobile is being used by the named insured or with his permission. The above Medical Coverage is extended to include the named insured and spouse and members of his immediate family, who are residents of his household at the time of the accident, while riding in any automobile not owned, leased or hired by the named insured, or if any of the same while pedestrians or bicyclists are struck by any motor vehicle.

II. **DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENTS.** As respects the insurance afforded by the other terms of this policy under coverages A and B the Exchange shall:

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Exchange may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail required of the insured in the event of accident or traffic law violation only with respect to Coverage A, during the policy period, not to exceed the usual charges of surety companies, and in no event to exceed $100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) pay all expenses incurred by the Exchange, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the Exchange has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the Exchange's liability thereon;



(d) pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;

(e) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the Exchange's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the Exchange in addition to the applicable limit of liability of this policy.

III. **DEFINITION OF 'INSURED.'** With respect to coverages A and B, the unqualified word 'insured' includes the named insured and, except where specifically stated to the contrary, also includes any person while using the automobile and any person or organization legally responsible for the use thereof, when used with the permission of the named insured. The insurance, with respect to coverages A and B, does not apply to injury to or death of any person who is a named insured. The insurance with respect to any person or organization other than the named insured does not apply:

(a) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(b) to any employee with respect to injury to or death of another employee of the same employer injured in the course of such employment if arising out of the maintenance or use of the automobile in the business of such employer.

IV. **AUTOMOBILES DEFINED, TRAILERS, TWO OR MORE AUTOMOBILES, INCLUDING AUTOMATIC INSURANCE.**

(a) Automobile. Except where stated to the contrary, the word 'automobile' means:

(1) **Described Automobile** — the motor vehicle or trailer described in this policy;

(2) **Utility Trailer** — under coverages A, B and G, a trailer not so described, if designed for use with a private passenger automobile, if not being used with another type automobile, light farm trucks excepted, and if not an office, store, display or passenger trailer.

(3) **Temporary Substitute Automobile** — under coverages A, B and G, an automobile not owned by the named insured while temporarily used as the substitute for the described automobile while withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction. This insuring agreement does not cover as an insured the owner of the substitute automobile or any employee of such owner.

(4) **Newly Acquired Automobile** — an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the Exchange within thirty days following the date of its delivery to him, and if it replaces an automobile described in this policy; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile. The word 'automobile' also includes under coverages C, D, E and F its equipment and other equipment permanently attached thereto.

(b) **Semi-trailer** — The word "trailer' includes semi-trailer.

(c) **Two or More Automobiles** — When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability under coverages A and B and separate automobiles as respects limits of liability, including any deductible provisions, under coverages C, D, E and F.

V. **USE OF OTHER AUTOMOBILES.** If the named insured is an individual who owns the private passenger automobile described or husband and wife either or both of whom own said automobile, such insurance as is afforded by this policy for bodily injury liability, for property damage liability and for medical payments with respect to said automobile, applies with respect to any other automobile, subject to the following provisions:

(a) With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes (1) such named insured, (2) the spouse of such individual if a resident of the same household and (3) any other person or organization legally responsible for the use by such named insured or spouse of an automobile not owned or hired by such other person or organization. Insuring Agreement III, Definition of Insured, does not apply to this insurance.

(b) This insuring agreement does not apply:

(1) to any automobile owned by, hired as part of a frequent use of hired automobiles by, or furnished for regular use to the named insured or a member of his household other than a private chauffeur or domestic servant of the named insured or spouse;

(2) to any automobile while used in the business or occupation of the named insured or spouse except a private passenger automobile operated or occupied by such named insured, spouse, chauffeur or servant;

(3) to any accident arising out of the operation of an automobile repair shop, public garage, sales agency, service station or public parking place;

(4) under coverage G, unless the injury results from the operation of such other automobile by such named insured or spouse or on behalf of either by such chauffeur or servant, or from the occupancy of said automobile by such named insured or spouse.

VI. LOSS OF USE BY THEFT — RENTAL REIMBURSEMENT. The Exchange following a theft covered under this policy, shall reimburse the named insured for expense not exceeding $5 for any one day nor totaling more than $150 or the actual cash value of the automobile at time of theft, whichever is less, incurred for the rental of a substitute automobile, including taxicabs

Reimbursement is limited to such expense incurred during the period commencing seventy-two hours after such theft has been reported to the Exchange and the police and terminating, regardless of expiration of the policy period, on the date the whereabouts of the automobile becomes known to the named insured or the Exchange or on such earlier date as the Exchange makes or tenders settlement for such theft.

Such reimbursement shall be made only if the stolen automobile was a private passenger automobile not used as a public or livery conveyance and not owned and held for sale by an automobile dealer.

VII. POLICY PERIOD, TERRITORY, PURPOSES OF USE. This policy applies only to accidents which occur and to direct and accidental losses to the automobile which are sustained during the policy period, while the automobile is within the United States of America, its territories or possessions, Canada or Newfoundland, or is being transported between ports thereof, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

EXCLUSIONS

This policy does not apply:

(a) under any of the coverages, while the automobile is used as a public or livery conveyance, unless such use is specifically declared and described in this policy and premium charged therefor

(b) under coverages A, B and G, to liability assumed by the insured under any contract or agreement;

(c) under coverages A and B, while the automobile is used for towing of any trailer not covered by like insurance in the Exchange; or while any trailer covered by this policy is used with any automobile not covered by like insurance in the Exchange;

(d) under coverages A and G, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or while engaged in the operation, maintenance or repair of the automobile, or while engaged in domestic employment if benefits therefore are either payable or required to be provided under any workman's compensation law.

(e) under coverage A, to any obligation for which the insured or any company as his insurer may be held liable under any workman's compensation law;

(f) under coverage B, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured.

(g) under coverage G, to bodily injury to or sickness, disease or death of any person, if benefits therefor are either payable or required to be provided under any workman's compensation law.

(h) under coverages C, D, E and F, while the automobile is subject to any bailment lease, conditional sale, mortgage or other encumbrance not specifically declared and described in this policy; to loss due to riot or civil commotion or war, whether or not declared, invasion, civil war, insurrection, rebellion or revolution or to confiscation by duly constituted governmental or civil authority;

to any damage to the automobile which is due to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other loss covered by this policy;

to robes, wearing apparel or personal effects;

to tires, unless damaged by fire or stolen or unless such loss be coincident with other loss covered by this policy;

(i) under coverages D and E, to loss due to conversion; embezzlement or secretion by any person in lawful possession of the automobile.

(j) under coverage F, to breakage of glass if insurance with respect to such breakage is otherwise afforded.

CONDITIONS

The conditions, except conditions 1 to 17 inclusive, apply to all coverages.
Conditions 1 to 17 inclusive apply only to the coverage or coverages noted thereunder.

1. Notice of Accident—Coverages A, B and G. When an accident occurs, written notice shall be given by or on behalf of the insured to the Exchange or any of its authorized agents as soon as practicable, but in any event within 60 days from date of accident. Such notice shall contain particulars sufficient to identify the insured, and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

2. Notice of Claim or Suit—Coverages A and B. If claim is made or suit is brought against the insured, the insured shall immediately forward to the Exchange every demand, notice, summons or other process received by him or his representative.

3. Limits of Liability—Coverages A, B and G. The limit of bodily injury liability stated in the declarations as applicable to 'each person' is the limit of the Exchange's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to 'each accident' is subject to the above provision respecting each person, the total limit of the Exchange's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

The limit of liability for medical payments stated in the declarations as applicable to 'each person' is the limit of the Exchange's liability for all expenses, incurred by or on behalf of each person who sustains bodily injury, sickness or disease, including death resulting therefrom, in any one accident.

The inclusion herein of more than one insured shall not operate to increase the limits of the Exchange's liability.

4. Action Against Exchange—Coverages A and B. No action shall lie against the Exchange unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Exchange

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the Exchange as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Exchange of any of its obligations hereunder.

5. Action Against Exchange—Coverage G. No action shall lie against the Exchange unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy, or until thirty days after the required proofs of claim have been filed with the Exchange.

6. Financial Responsibility Laws—Coverages A and B. Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any State or Province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the Exchange for any payment made by the Exchange which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

7. Assault and Battery—Coverages A and B. Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

8. Medical & Other Reports: Examination—Coverage G. As soon as practicable the injured person or someone on his behalf shall give to the Exchange written proof of claim, under oath if required, and shall after each request from the Exchange, execute authorization to enable the Exchange to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the Exchange when and as often as the Exchange may reasonably require.

9. Proof and Payment of Claim—Coverage G. The Exchange may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute admission of liability of the insured, or except hereunder, of the Exchange.

10. Named Insured's Duties When Loss Occurs—Coverages C, D, E and F.

When loss occurs, the named insured shall:

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the named insured's failure to protect shall not be recoverable under this policy; reasonable expense incurred in affording such protection shall be deemed incurred at the Exchange's request;

(b) give notice thereof as soon as practicable to the Exchange or any of its authorized agents and also in the event of theft, larceny, robbery or pilferage to the police but shall not, except at his own cost, offer or pay any reward for recovery of the automobile;

(c) file proof of loss with the Exchange within sixty days after the occurrence of loss, unless such time is extended in writing by the Exchange, in the form of a sworn statement of the named insured setting forth the interest of the named insured and of all others in the property affected, any encumbrances thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, the amount of rental or other expense for which reimbursement is provided under this policy, together with original receipts therefor, and the description and amounts of all other insurance covering such property.

Upon the Exchange's request, the named insured shall exhibit the damaged property to the Exchange and submit to examinations under oath by anyone designated by the Exchange, subscribe the same and produce for the Exchange's examination all pertinent records and sales invoices, or certified copies if originals be lost, permitting copies thereof to be made, all at such reasonable times and places as the Exchange shall designate.

11. APPRAISAL—Coverages C, D, E and F. If the named insured and the Exchange fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty days after receipt of proof of loss by the Exchange, select a competent and disinterested appraiser, and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen days to agree upon such umpire; then, on the request of the named insured or the Exchange, such umpire shall be selected by a judge of a Court of Record in the County and State in which such appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The named insured and the Exchange shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The Exchange shall not be held to have waived any of its rights by any act relating to appraisal.

12. Coverage While in Mexico. Coverage under Insuring Agreements A, B, F1, F2, C, and coverages C, D, and E, excluding THEFT OR RENTAL REIMBURSEMENT THEREFOR, apply while the automobile insured is being used for occasional trips for a period not exceeding ten days at any one time, in that part of the Republic of Mexico lying not more than 25 miles from the boundary line of the United States of America.

It is agreed that any claim payable under coverages C, D, E, and F1, arising or resulting from any loss or damage occurring in such Mexican territory, shall be payable in the United States of America, and that in the event of loss or damage which may make necessary the repair of the automobile or replacement of any part or parts thereof, while said automobile is in such Mexican territory, the basis of adjustment of claim for such repairs and/or replacement shall not exceed the cost of such repairs and/or replacement at the nearest point in the United States where such repairs and/or replacement can be made; and it is further expressly understood and agreed that the cost of towing and/or transportation, and/or salvage operations of the insured automobile while within Mexican territory, shall not be recoverable hereunder and is not a contingency insured against.

It is agreed that the coverage provided herein shall be void unless the insured's place of residence is within the United States of America, and the automobile covered by this policy is principally garaged, maintained and used within the United States of America.

13. Limit of Liability; Settlement Options; No Abandonment—Coverages C, D, E and F. The limit of the Exchange's liability for loss shall not exceed the actual cash value of the automobile, or if the loss is of a part thereof the actual cash value of such part, at time of loss or what it would then cost to repair or replace the automobile or such part thereof with other of like kind and quality, with deduction for depreciation, or the applicable limit of liability stated in the declarations.

The Exchange may pay for the loss in money or may repair or replace the automobile or such part thereof, as aforesaid, or may return any stolen property with payment for any resultant damage thereto at any time before the loss is paid or the property is so replaced, or may take all or such part of the automobile at the agreed or appraised value but there shall be no abandonment to the Exchange.

14. Payment for Loss; Action Against Exchange—Coverages C, D, E and F. No action shall lie against the Exchange unless, as a condition precedent thereto, the named insured shall have fully complied with all the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

15. No Benefit to Bailee—Coverages C, D, E and F. The insurance afforded by this policy shall not enure directly or indirectly to the benefit of any carrier or bailee liable for loss to the automobile.

16. Assistance & Cooperation of the Insured—Coverages A, B, C, D, E, F, and G. The insured shall cooperate with the Exchange and, upon the Exchange's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

17. Subrogation—Coverages A, B, C, D, E and F. In event of any payment under this policy, the Exchange shall be subrogated to all the insured's or insured's passengers rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

18. Other Insurance—Coverages A, B, C, D, E and F. If the insured has other insurance against a loss covered by this policy the Exchange shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under Insuring Agreements IV and V shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under either or both of said insuring agreements.

19. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Exchange from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed for MAYFLOWER INSURANCE EXCHANGE, by an executive officer of its attorney-in-fact, the MAYFLOWER UNDERWRITERS, INC.

20. Assignment. Assignment of interest under this policy shall not bind the Exchange until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the Exchange within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) under coverages A and B, subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of the automobile, as an insured, and under coverage G while the automobile is used by such person, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

21. Cancellation. This policy may be canceled by the named insured by mailing to the Exchange written notice stating when thereafter such cancellation shall be effective. This policy may be canceled by the Exchange by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the Exchange shall be equivalent to mailing.

If the named insured cancels, earned premiums shall be computed in accordance with the customary short rate table and procedure. If the Exchange cancels, earned premiums shall be computed pro rata. Premium adjustment may be made at the time cancellation is effected and, if not then made, shall be made as soon as practicable after cancellation becomes effective. The Exchange's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

22. Declarations. By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Exchange or any of its agents relating to this insurance.

Terms of this policy which are in conflict with the statutes of the State wherein this policy is issued, are hereby amended to conform to such statutes.

23. Reciprocal Provisions. This policy is made and accepted in consideration of (1) the payment of the Membership Fee and the Premium Deposit herein provided, (2) the declarations made in the application for the Policy, and (3) the execution of a power of attorney to MAYFLOWER UNDERWRITERS, INC., herein called the "Corporation," authorizing it to execute insurance policies between the holder of this policy, herein called the "named insured," and other subscribers to the MAYFLOWER INSURANCE EXCHANGE.

No term or condition of the policy is intended to create, creates, or shall be construed to create a partnership or mutual insurance association, or to give rise to or create any joint liability.

To enforce any claims arising under this policy the Exchange shall be sued or sue in its own name as in the case of an individual. Service of process in any such suit against the Exchange shall be upon the MAYFLOWER UNDERWRITERS, INC., Attorney-in-fact.

Membership Fees paid upon commencement of coverage on this policy, which are in addition to the premium, are not returnable but may be applied as a credit to Membership Fees required of the named insured for insurance accepted by the Exchange.

The entire policy shall automatically and immediately become canceled and void upon the expiration date of any current term, if the named insured defaults in making payment of amounts required to maintain the premium deposit.

The annual meeting of the members of the Exchange shall be held at the Home Office of the Exchange at Seattle 1, Wash., on the first Monday following the 14th day of March of each year, at the hour of 10 A. M., unless the Board of Governors shall elect to change the time and place of such meeting, in which case, but not otherwise, written or printed notice shall be mailed each member at his last known address at least ten days prior thereto. The Board of Governors shall be chosen by the subscribers from among themselves, at the annual meeting, or any special meeting held for that purpose and shall have full power and authority to establish rules and regulations for the management of the Exchange not inconsistent with subscriber's agreements.

The Premium Deposit for this policy and all payments made for its continuance shall be payable to the Exchange at the Home Office of the Exchange. The funds so paid shall be placed to the credit of the named insured upon the records of the Exchange and applied to the payment of insured's proportion of losses and expenses and to the establishment of reserves and general surplus. All such funds may be deposited and withdrawn or invested as the Board of Governors or its Executive Committee designates. The insured agrees that any amount contributed to a general surplus fund out of his premium deposit may be retained by the Exchange and applied to any purpose deemed proper and advantageous to policy-holders.

The insured's aggregate contingent liability under this policy shall not be more than one additional premium deposit.

IN WITNESS WHEREOF, the Exchange executed these presents; but this policy shall not be valid unless countersigned on the Declarations page by a duly authorized representative of the Exchange.

MAYFLOWER INSURANCE EXCHANGE,

By Mayflower Underwriters, Inc., Attorney-in-fact.

Secretary. President.

[Endorsed]: Filed October 1, 1957

Exhibit "B"--(Continued)

AUTOMOBILE LOSS PAYABLE ENDORSEMENT

With respect to the interest of the Lien Holder named on face of Policy Declaration.

its successors and assigns, (hereinafter called the Lien-Holder) in its capacity as conditional Vendor or Mortgagee or otherwise, in the property insured under this policy, this Company hereby agrees as follows:

1. Loss or damage, if any, to the property described in this policy shall be payable firstly to the Lien-Holder and secondly to the insured, as their interests may appear, provided nevertheless that upon demand by the Lien-Holder upon the Company for separate settlement the amount of said loss shall be paid directly to the Lien-Holder to the extent of its interest and the balance, if any, shall be payable to the insured.

2. The insurance under this policy as to the interest only of the Lien-Holder shall not be impaired in any way by any change in the title or ownership of the property or by any breach of warranty or condition of the policy, or by any omission or neglect, or by the performance of any act in violation of any terms or conditions of the policy or because of the failure to perform any act required by the terms or conditions of the policy or because of the subjection of the property to any conditions, use or operation not permitted by the policy or because of any false statement concerning this policy or the subject thereof, by the insured or the insured's employees, agents or representatives; whether occurring before or after the attachment of this agreement, or whether before or after the loss; PROVIDED, however, that the wrongful conversion, embezzlement or secretion by the Purchaser, Mortgagor, or Lessee in possession of the insured property under mortgage, conditional sale contract, lease agreement, or other contract is not covered under this policy, unless specifically insured against and premium paid therefor.

3. In the event of failure of the insured to pay any premium or additional premium which shall be or become due under the terms of this policy, this Company agrees to give written notice to the Lien-Holder of such non-payment of premium after thirty (30) days from and within one hundred and twenty (120) days after due date of such premium and it is a condition of the continuance of the rights of the Lien-Holder hereunder that the Lien-Holder when so notified in writing by this Company of the failure of the insured to pay such premium shall pay or cause to be paid the premium due within ten (10) days following receipt of the Company's demand in writing therefor. If the Lien-Holder shall decline to pay said premium or additional premium, the rights of the Lien-Holder under this Automobile Loss Payable Endorsement shall not be terminated before ten (10) days after receipt of said written notice by the Lien-Holder.

4. If the Company elects to cancel this policy in whole or in part for non-payment of premium, or for any other reason, the Company will forward a copy of the cancellation notice to the Lien-Holder at its office specified hereinafter concurrently with the sending of notice to the insured but in such case this policy shall continue in force for the benefit of the Lien-Holder only for ten (10) days after written notice of such cancellation is received by the Lien-Holder. In no event, as to the interest only of the Lien-Holder, shall cancellation of any insurance under this policy covering the property described in the policy be effected at the request of the insured before ten (10) days after written notice of request for cancellation shall have been given to the Lien-Holder by the Company. In the event of cancellation of this policy the unearned premium shall be paid to the Lien-Holder, provided the said Lien-Holder has advanced the premium.

5. If there be any other insurance upon the within-described property, this Company shall be liable under this policy as to the Lien-Holder only for the proportion of such loss or damage that the sum hereby insured bears to the whole amount of valid and collectible insurance of similar character on said property under policies held by, payable to and expressly consented to by the Lien-Holder, and to the extent of payment so made this Company shall be subrogated (pro rata with all other insurers contributing to said payment) to all of the Lien-Holder's rights of contribution under said other insurance.

6. Whenever this Company shall pay to the Lien-Holder any sum for loss or damage under this policy and shall claim that as to the insured no liability therefor exists, this Company at its option, may pay to the Lien-Holder the whole principal sum and interest due or to become due from the insured on the obligation secured by the property insured under this policy, (with refund of all interest not accrued), and this Company shall thereupon receive a full assignment and transfer, without recourse, of said obligation and the security held as collateral therato; but no subrogation shall impair the right of the Lien-Holder to recover the full amount of its claim.

7. The coverage granted under this policy shall continue in full force and effect as to the interest of the Lien-Holder only, for a period of ten (10) days after expiration of said policy unless an acceptable policy in renewal thereof with loss thereunder payable to the Lien-Holder in accordance with the terms of this Automobile Loss Payable Endorsement shall have been issued by some insurance company and accepted by the Lien-Holder. In the event of a loss not otherwise covered during the extended ten (10) day period herein referred to, an annual policy covering the same hazards to the property insured under the original policy shall be issued and accepted by the Lien-Holder and Mortgagor.

8. Should the ownership and right of possession of any of the property covered under this policy become vested in the Lien-Holder or its agent, this policy shall continue for the term thereof for the benefit of the Lien-Holder (with all incidents of ownership of the policy) but, in such event, Paragraphs two (2), five (5) and six (6) of this Automobile Loss Payable Endorsement shall no longer apply; provided, nevertheless, all privileges and endorsements which, by reason of the printed conditions of this policy, are or may be necessary to maintain the validity of the contract are hereby granted for a period of thirty (30) days and all notices likewise required to be given to the Company by the insured are hereby waived for a period of thirty (30) days with the exception of requirements applying at the time of or subsequent to a loss.

9. All notices herein provided to be given by the Company to the Lien-Holder in connection with this policy and this Automobile Loss Payable

Endorsement shall be mailed to or delivered to the Lien-Holder at its office or branch shown on Declaration.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, agreements or limitations of the policy to which this Endorsement is attached, other than as stated above.

THIS IS A CONTINUOUS TYPE POLICY. Please return to assured when mortgage is paid. YOUR INTEREST will be protected until mortgage is satisfied unless policy is previously cancelled, in which case you will receive 10 days advance notice.

Mayflower Insurance Exchange

Mayflower Corporation, Attorney-in-Fact
Seattle 1, Washington

B. L. Barnard

President

E Form 49A – 1955B

[Title of District Court and Cause.]

SUMMONS

To the above named Defendants:

You are hereby summoned and required to appear and defend this action and to serve upon Arthur S. Vosburg and Frank McK. Bosch, plaintiff's attorneys, whose address is 909 American Bank Building, Portland 5, Oregon, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: October 1, 1957.

[Seal] R. DeMOTT,
Clerk,
/s/ M. CASEY,
Deputy Clerk.

Return on Service Attached.

[Endorsed]: Filed October 4, 1957.

[Title of District Court and Cause.]

ANSWER

Come now the defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont, and for their answer to the plaintiff's complaint for declaratory judgment, admit, deny and allege as follows:

I.

Admits Paragraphs I and II.

II.

That the defendants have been informed and believe the truth of Paragraph III and therefore admit the same.

III.

Admit Paragraphs IV and V.

IV.

That the defendants do not have any knowledge or information thereof to form sufficient belief and therefore deny Paragraphs VI, VII and VIII.

Come now the defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont, and for their first, separate, further answer and affirmative defense, allege:

I.

That the defendants Gilmont have been informed and believe and therefore allege that the plaintiff had notice or should have known on or about June 14, 1957 that defendant Arthur Allen McKinzie had not been issued a valid driver's license from the State of Oregon and that having such knowledge the plaintiff continued to act on behalf of defendant McKinzie as his insurer and thereby waived such lack of a valid operator's license as a defense and is therefore estopped from asserting the lack of a valid operator's license as a defense.

Come now the defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont, and for their second, separate further answer and affirmative defense, allege:

I.

That the defendants Gilmont have been informed and believe and therefore allege that subsequent to the accident of June 8, 1957, which is described in plaintiff's complaint, the plaintiff recognized and admitted insurance coverage under the policy mentioned in the plaintiff's complaint by the paying to defendant McKinzie the amount of his property damage less the deductible under the collision or upset section of the policy issued to defendant McKinzie. That by such payment the plaintiff admitted that the aforementioned policy was in full force and effect and thereby waives all policy defense and is therefore estopped from asserting such defense.

Come now the defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont, and for their third separate further answer and affirmative defense, allege:

I.

That subsequent to being placed on notice of a policy defense the plaintiff continued to negotiate for a personal injury settlement with defendants' Gilmont attorneys as if such defense did not exist and at no time did plaintiff notify prior to this

suit defendants' Gilmont attorneys of such a defense. That by continued negotiation with defendants' Gilmont counsel waived such policy defense as they may have had and therefore plaintiff is estopped from asserting such defense.

Wherefore, defendants Gilmont having fully answered plaintiff's complaint for declaratory judgment pray that the same should be dismissed and that defendants Gilmont recover their costs and disbursements incurred herein.

/s/ HOLGER M. PIHL, JR.,
CRUM, WALKER & BUSS,
Attorneys for Defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 18, 1957.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above entitled cause came on regularly for pretrial conference before the undersigned Judge of the above entitled court on the 21st day of April, 1958, plaintiff appearing by Frank McK. Bosch, one of its attorneys, and defendants Robert Dean Gilmont and Rose Marie Gilmont appearing by Jack L. Kennedy, one of their attorneys, and defendants Susan Rose Gilmont, Robert Russell Gil-

mont and Norman I. Gilmont appearing by Ronald A. Watson, their guardian ad litem, and by Jack L. Kennedy, one of their attorneys, and defendant Arthur Allen McKinzie appearing neither in person nor by counsel and the parties with the approval of the court agreed on the following:

Nature of the Case

This action was commenced by plaintiff Mayflower Insurance Exchange under Title 28 of the United States Code, Section 400 (28 U.S.C.A. 2201) to determine the rights and liabilities of the parties in connection with the issuance of a public liability insurance policy to defendant Arthur Allen McKinzie and in connection with a subsequent automobile accident between automobiles operated by defendant Arthur Allen McKinzie and defendant Robert Dean Gilmont which resulted in property damages and personal injuries to defendants Gilmont.

Admitted Facts

I.

Plaintiff Mayflower Insurance Exchange is an unincorporated association organized under the laws of the State of Washington as a reciprocal or interinsurance exchange and is authorized by the laws of the State of Washington to sue and be sued in its own name, and defendant Arthur Allen McKinzie is a citizen of either the State of Oregon or the State of California and the defendants Gilmont are citizens of the State of Oregon, and the matter in controversy exceeds the sum of $3,000.00 exclusive of interest and costs.

II.

Defendants Robert Dean Gilmont and Rose Marie Gilmont are husband and wife, and defendants Susan Rose Gilmont, Robert Russell Gilmont and Norman I. Gilmont, are their minor children, and Ronald A. Watson, a member of the bar of this court, has been appointed Guardian ad Litem for said minor children to appear and represent them in the above entitled cause.

III.

On or about April 16, 1957, plaintiff Mayflower Insurance Exchange issued a certain policy of insurance to defendant Arthur Allen McKinzie, which insured the said Arthur Allen McKinzie against public liability for personal injuries and property damages arising out of the operation of his 1951 Cadillac coupe automobile, with limits of $10,000.00 for injuries to any one person, $20,000.00 for injuries arising out of any one accident, and $5,000.00 for property damages.

IV.

On or about the 8th day of June, 1957, near Toledo, Oregon, defendant Arthur Allen McKinzie, while operating his 1951 Cadillac automobile which was insured by said insurance policy, was involved in a collision with an automobile owned and operated by defendant Robert Dean Gilmont, and said collision resulted in personal injuries to all of the defendants Gilmont and damage to the automobiles owned by defendant Arthur Allen McKinzie and defendant Robert Dean Gilmont.

V.

That defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont and Norman L. Gilmont have retained an attorney and are demanding that defendant Arthur Allen McKinzie and plaintiff respond in damages for the injuries sustained by said defendants; that defendant Arthur Allen McKinzie is claiming that plaintiff is obligated under the terms of said policy to provide a defense for said defendant in any action that may be brought against him for damages arising out of the aforementioned accident and to pay any judgment that may be rendered against him within the limits of said policy.

Contentions of the Plaintiff

I.

That on or about April 16, 1957 at Portland, Oregon, defendant Arthur Allen McKinzie made application to the plaintiff for a policy of insurance covering defendant Arthur Allen McKinzie in the operation of a certain 1951 Cadillac coupe automobile, motor No. 516262287, Oregon license No. 4G-2710, and insuring against public liability for personal injuries arising out of the operation of said automobile with limits of $10,000.00 for injuries to any one person and $20,000.00 for injuries arising out of any one accident, and against property damage with limits of $5,000.00 for each accident. That subsequent to the receipt of said application and in reliance upon the statements and

representations made therein, plaintiff issued to defendant Arthur Allen McKinzie its automobile liability insurance policy No. 174380.

II.

That certain statements and representations made by the defendant Arthur Allen McKinzie in his application for said insurance policy No. 174380 were false in that on April 16, 1957 the defendant Arthur Allen McKinzie made the following answers to the following questions put to him by said application:

"1. Have you or Any Driver of this car

(a) any physical impairment? No.

(b) had auto insurance cancelled or refused? No.

(c) had license revoked or suspended? No.

(d) received any driving charges, citations or fines (not parking) in past 3 years? No.

(e) been involved in any auto accident as a driver in past 3 years? No.

2. Name of previous Insurer: None."

whereas in truth and in fact defendant Arthur Allen McKinzie's driving privileges had been suspended by the Department of Motor Vehicles of the State of Oregon which suspension was in effect on April 16, 1957; that defendant Arthur Allen McKinzie had received various driving charges, citations or fines (not parking) in the 3 years prior to April 16, 1957; that defendant Arthur Allen McKinzie had been involved in an auto accident as a

driver within 3 years prior to April 16, 1957; and that defendant Arthur Allen McKinzie did have previous insurers who had issued to him automobile liability insurance policies prior to April 16, 1957.

III.

That plaintiff would not have issued its automobile liability insurance policy No. 174380 to defendant Arthur Allen McKinzie had it known the true state of facts and if the defendant Arthur Allen McKinzie had truthfully and correctly answered the questions put to him on said application.

IV.

That as soon as plaintiff learned of the false statements and misrepresentations made by the defendant Arthur Allen McKinzie it notified him of its decision to rescind the policy issued to him and tendered to him its check in full refund of all premiums paid thereon which refund was accepted by defendant Arthur Allen McKinzie.

V.

That no valid policy of insurance has ever been issued to defendant Arthur Allen McKinzie; that the purported policy of insurance No. 174380 was null and void and of no force and effect and plaintiff is not obligated to provide a defense for defendant Arthur Allen McKinzie in any action that may be brought against him or to pay any judgment that may be rendered against him arising out of or connected with the aforementioned accident of June 8, 1957.

VI.

Plaintiff is entitled to declaratory judgment as follows:

1. That policy No. 174380 issued by plaintiff as of April 16, 1957 was null and void as of the date of its issue;

2. That plaintiff is under no duty or obligation to defend defendant Arthur Allen McKinzie in any action, suit or proceeding that may be brought or instituted against him arising out of an accident which occurred June 8, 1957 at a point on U. S. Highway No. 20 approximately 6.5 miles east of Toledo, Oregon;

3. That plaintiff is under no duty and is not obligated to pay any judgment that may be rendered against defendant Arthur Allen McKinzie which may arise out of the aforementioned accident;

4. That defendants Robert Dean Gilmont, Rose Marie Gilmont, Susan Rose Gilmont, Robert Russell Gilmont, Norman I. Gilmont, and each of them, be restrained from instituting any legal proceeding against plaintiff for the recovery of the amount of any judgment that said defendants, or any of them, might hereinafter obtain against defendant Arthur Allen McKinzie;

5. That plaintiff recover its costs and disbursements incurred herein.

VII.

Plaintiff denies the contentions of defendants Gilmont except as admitted in the above contentions or in the admitted facts.

Contentions of Defendants Gilmont

I.

Said automobile collision referred to in the Admitted Facts resulted in personal injuries to all of the defendants Gilmont and damage to the automobile owned by defendant Robert Dean Gilmont, and said collision and personal injuries and damages are within the terms, provisions, and coverage of the insurance policy sold and issued to defendant Arthur Allen McKinzie by plaintiff Mayflower Insurance Exchange.

II.

At all times mentioned in plaintiff's complaint and in this pretrial order, defendant Arthur Allen McKinzie was a resident of the State of California and had been issued a valid driver's license from the State of California which was in full force and effect on the date of the issuance of said public liability insurance policy and on the date of said automobile accident.

III.

Plaintiff received notice and knowledge of said accident immediately following said collision and thereafter investigated the facts and circumstances involved in said collision, and defendants Gilmont are informed and believe and therefore allege that at said time the plaintiff knew, or in the exercise of reasonable care, should have known that defendant Arthur Allen McKinzie was operating his automobile without a valid driver's license from the State of Oregon.

IV.

Prior to said automobile accident and on or about the 7th day of June, 1957, plaintiff notified defendant Arthur Allen McKinzie that his automobile insurance would be cancelled on June 14, 1957, unless a certain balance of the premium was paid before said cancellation date and thereafter and on or about the 28th day of June, 1957, plaintiff notified defendant Arthur Allen McKinzie that his automobile insurance was not in force because the premium had not been paid prior to the cancellation date.

V.

On or about the 26th day of July, 1957, plaintiff obtained proof of loss from defendant Arthur Allen McKinzie wherein the said Arthur Allen McKinzie released the plaintiff from all claims for damage to his 1951 Cadillac automobile which had resulted from said collision, and on or about July 31, 1957, plaintiff paid Arthur Allen McKinzie and City Finance Company the sum of $956.45 in full satisfaction of said claim for property damage.

VI.

Plaintiff further failed to notify the Department of Financial Responsibility of the State of Oregon until October 29, 1957, that it was denying coverage under said insurance policy.

VII.

At all times mentioned herein the plaintiff by and through its adjusters negotiated with the attor-

neys for defendants Gilmont with respect to said personal injury claim of defendants Gilmont as if said insurance policy was in full force.

VIII.

During the month of December, 1957, defendant Robert Dean Gilmont and defendant Rose Marie Gilmont commenced an action against defendant Arthur Allen McKinzie in the Circuit Court of the State of Oregon for the personal injuries that they sustained as a result of the carelessness and negligence of the said Arthur Allen McKinzie, and on or about the 15th day of January, 1958, the plaintiff assumed the defense of the said Arthur Allen McKinzie in the Circuit Court of the State of Oregon for the County of Lincoln and appeared therein by and through its attorneys and is presently defending the said Arthur Allen McKinzie in said action for damages.

IX.

Plaintiff was careless and negligent in obtaining and completing the application for insurance from defendant Arthur Allen McKinzie.

X.

Plaintiff was careless and negligent in investigating said automobile accident and facts and circumstances concerning the driving record of defendant Arthur Allen McKinzie.

XI.

Plaintiff has waived any claimed defense under said insurance policy and it is barred and estopped from maintaining these proceedings or denying coverage under said insurance policy.

XII.

Plaintiff has been guilty of laches and has further affirmed its contract of insurance with defendant Arthur Allen McKinzie, and it is not entitled to rescind its insurance contract or the coverage under its insurance policy.

XIII.

Defendants are entitled to a declaratory judgment that insurance policy No. 174380 issued by Mayflower Insurance Exchange was in full force and effect and binding on the plaintiff on the date of the automobile accident between automobiles operated by defendant Arthur Allen McKinzie and defendant Robert Dean Gilmont; that plaintiff is under a duty and obligation to defend Arthur Allen McKinzie in any action, suit or proceedings that may be brought or instituted against him arising out of the said automobile accident; that plaintiff is under a duty and obligation to pay any judgment that may be entered against defendant Arthur Allen McKinzie to and including the amount of insurance contained in said insurance policy; and that defendants Gilmont are entitled to recover their costs and disbursements incurred herein.

XIV.

Defendants Gilmont deny the contentions of the plaintiff, except as admitted in the above contentions or in the admitted facts.

Issues

I.

Was public liability insurance policy No. 174380 issued by Mayflower Insurance Exchange to Arthur Allen McKinzie on April 16, 1957, null and void and of no force and effect as of the date of its issuance, or was it valid and binding on June 8, 1957, the date of the collision between automobiles operated by defendant Arthur Allen McKinzie and Robert Dean Gilmont?

II.

Is Mayflower Insurance Exchange under any duty or obligation to defend defendant Arthur Allen McKinzie in the action for personal injuries which has been commenced against him by defendant Robert Dean Gilmont and defendant Rose Marie Gilmont, or obligated to defend defendant Arthur Allen McKinzie in any other action which may be commenced against him by any of the defendants Gilmont arising out of the automobile accident which occurred on June 8, 1957?

III.

Is plaintiff under a duty or obligation to pay any judgment that may be entered in favor of any of the defendants Gilmont and against the defendant

Arthur Allen McKinzie resulting out of the facts and circumstances involved in the aforesaid accident?

IV.

Should the defendants Gilmont and each of them be restrained from instituting any legal proceedings against plaintiff for the recovery of any judgment that defendants Gilmont may hereafter obtain against Arthur Allen McKinzie?

V.

Was plaintiff careless and negligent in obtaining and completing the application for insurance from defendant Arthur Allen McKinzie?

VI.

Was plaintiff careless and negligent in investigating said automobile accident and the facts and circumstances concerning the driving record of defendant Arthur Allen McKinzie?

VII.

Has plaintiff waived any claimed defense of its insurance policy issued to defendant Arthur Allen McKinzie?

VIII.

Should plaintiff be barred and estopped from maintaining this suit or denying coverage of its insurance policy?

IX.

Has plaintiff been guilty of laches?

X.

Has plaintiff affirmed its contract of insurance with defendant Arthur Allen McKinzie?

XI.

Is plaintiff entitled to rescind its insurance contract or the coverage under its insurance policy?

Jury Trial

The defendants Gilmont have timely requested that this cause be tried by a jury.

Physical Exhibits

Plaintiff and defendants Gilmont admit the identity and authenticity of the following exhibits and waive further identification but reserve all objections to such exhibits on the grounds of relevancy, materiality and competency and the right to object to any of the questions propounded in any of the depositions and the answers thereto on the grounds of relevancy, materiality and competency and further agree that any party may offer an exhibit listed by any other party.

Plaintiff's Exhibits

1. Original copy of application for insurance policy No. 174380.

2. Duplicate original copy of receipt dated April 16, 1957 acknowledging partial payment of $20.00 on account of initial premium due on policy No. 174380.

3. True copy of policy No. 174380.

4. Copy of form letter dated June 28, 1957 from home office of plaintiff, Mayflower Insurance Exchange, addressed to defendant Arthur Allen McKinzie.

5. Original automobile proof of loss executed by Arthur Allen McKinzie under date of July 26, 1957.

6. Draft No. D11688 issued by plaintiff, Mayflower Insurance Exchange, in the sum of $945.45 and made payable to the order of defendant Arthur Allen McKinzie and City Finance Co.

7. Certified copy of motor vehicle driving record of defendant Arthur Allen McKinzie issued by James F. Johnson, Director, Department of Motor Vehicles, State of Oregon, dated September 3, 1957.

8. Copy of letter dated September 23, 1957 addressed to defendant Arthur Allen McKinzie.

9. Draft of plaintiff, Mayflower Insurance Exchange, dated September 18, 1957 made payable to the order of defendant Arthur A. McKinzie in the sum of $20.00 which was enclosed with Plaintiff's Exhibit 8.

10. Copy of letter dated July 2, 1957 addressed to Oregon State Police, Bureau of Records, Salem, Oregon.

11. Original letter dated July 11, 1957 addressed to plaintiff, Mayflower Insurance Exchange, at its home office, Seattle, Washington.

12. Copy of letter dated July 18, 1957 addressed to State of Oregon, Department of Motor Vehicles, Salem, Oregon.

13. Original letter dated July 25, 1957 addressed

to plaintiff, Mayflower Insurance Exchange, at its home office, Seattle, Washington.

14. Copy of letter dated August 20, 1957 addressed to State of Oregon, Department of Motor Vehicles, Salem, Oregon.

15. Original letter dated August 23, 1957 addressed to plaintiff, Mayflower Insurance Exchange, at its claims office, Portland, Oregon.

16. Memorandum receipt No. 71883 dated September 4, 1957 issued by Department of Motor Vehicles of Oregon to plaintiff, Mayflower Insurance Exchange, for $1.00 fee in connection with plaintiff's Exhibit 7.

17. Copy of letter dated October 29, 1957 addressed to State of Oregon, Department of Licenses, Financial Responsibility Division, Salem, Oregon.

18. Duplicate original copy of agreement dated January 15, 1958, between plaintiff, Mayflower Insurance Exchange and defendant Art Allen McKinzie.

19. Abstract of driving record of defendant Art Allen McKinzie certified by the Department of Motor Vehicles of the State of California to be photographic copies of the originals on file.

Exhibits of Defendants Gilmont

1. Deposition of Arthur Allen McKinzie and exhibits attached thereto.

2. Deposition of Donald Eugene Dorris.

3. Deposition of Ruben Edward Snyder.

4. Interrogatories of defendants Gilmont to Mayflower Insurance Exchange.

5. Answers of Mayflower Insurance Exchange to interrogatories propounded by defendants Gilmont.

6. Letter from Claims Department of Mayflower Insurance Exchange to Mr. Robert Gilmont dated June 13, 1957.

7. Oregon State Police Report of accident of June 8, 1957, between automobiles operated by Arthur Allen McKinzie and Robert Dean Gilmont.

8. Copy of complaint by Robert Dean Gilmont, plaintiff, vs. Arthur Allen McKinzie, defendant, in the Circuit Court of the State of Oregon for the County of Lincoln.

9. Copy of motion by Arthur Allen McKinzie in the case of Robert Dean Gilmont, plaintiff, vs. Arthur Allen McKinzie, defendant, in the Circuit Court of the State of Oregon for the County of Lincoln.

10. Copy of complaint by Rose Marie Gilmont, plaintiff, vs. Arthur Allen McKinzie, defendant, in the Circuit Court of the State of Oregon for the County of Lincoln.

11. Copy of motion by Arthur Allen McKinzie in the case of Rose Marie Gilmont, plaintiff, vs. Arthur Allen McKinzie, defendant, in the Circuit Court of the State of Oregon for the County of Lincoln.

12. Statement of amount due and cancellation notice from Mayflower Insurance Exchange to Arthur Allen McKinzie dated June 4, 1957.

13. Claim file of Mayflower Insurance Exchange

regarding accident of June 8, 1957, between automobiles operated by Arthur Allen McKinzie and Robert Dean Gilmont.

14. Form of Oregon Traffic Accident and Financial Responsibility Report.

15. Certified copy of motor vehicle driving record of defendant Arthur Allen McKinzie issued by Director, Department of Motor Vehicles of the State of Oregon, dated February 27, 1958.

16. Statement of Arthur Allen McKinzie dated July 26, 1957.

17. Copy of letter from Mayflower Insurance Exchange to St. Vincent's Hospital, dated July 19, 1957.

18. Memorandum communication from Mel Kosta, Claims Manager, Portland Office, Mayflower Insurance Exchange to Home Office, Mayflower Insurance Exchange.

19. Memorandum communication from Mel Kosta, Claims Manager, Portland Office, Mayflower Insurance Exchange to Home Office, Mayflower Insurance Exchange.

The parties have agreed to the foregoing pretrial order and the court being fully advised in the premises;

Now Therefore, It Is Hereby Ordered that the foregoing constitutes the pretrial order in the above entitled cause and supplements the pleadings herein and shall not be amended hereafter except to prevent manifest injustice or by consent of the parties.

Dated this 19th day of June, 1958.

/s/ WILLIAM G. EAST,
District Judge.

The foregoing form of Pretrial Order is hereby approved:

/s/ FRANK BOSCH
Of Attorneys for Plaintiff.
/s/ JACK L. KENNEDY
Of Attorneys for Defendants Gilmont.

[Endorsed]: Filed February 19, 1958.

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL ANSWER

Come now the Defendants Robert Dean Gilmont, Rose Marie Gilmont, and Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor, and Norman I. Gilmont, a minor, by Ronald A. Watson, guardian ad litem for said minors, and leave of Court being first had and obtained, files this their amended and supplemental answer to plaintiff's complaint and admit, deny and allege as follows:

I.

Defendants deny the allegations contained in paragraph I of plaintiff's complaint, except that defendants admit that all of the defendants are citizens of the State of Oregon and that the matter

in controversy exceeds the sum of $3,000.00 exclusive of interest and costs.

II.

Defendants admit the allegations contained in paragraph II of plaintiff's complaint.

III.

Defendants do not have any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph III of plaintiff's complaint and therefore deny the same, except that defendants admit that the plaintiff issued a certain policy of insurance to defendant Arthur Allen McKinzie which insured the said Arthur Allen McKinzie against public liability for personal injuries arising out of the operation of his certain 1951 Cadillac coupe automobile.

IV.

Defendants admit the allegations contained in paragraph IV of plaintiff's complaint.

V.

Defendants admit the allegations contained in paragraph V of plaintiff's complaint.

VI.

Defendants do not have any knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph VI of plaintiff's complaint and therefore deny the same, except that defendants have been informed

and therefore admit that the driver's license of defendant Arthur Allen McKinzie had been suspended in the State of Oregon under date of February 14, 1956, for a period of one year and that defendant Arthur Allen McKinzie was convicted in the District Court of the State of Oregon, County of Benton, on February 14, 1956, for the traffic offense of "no muffler".

VII.

Defendants deny the allegations contained in paragraph VII of plaintiff's complaint.

VIII.

Defendants deny the allegations contained in paragraph VIII of plaintiff's complaint.

And for a first, separate and affirmative answer and defense, defendants Gilmont allege:

I.

On or about the 16th day of April, 1957, the plaintiff issued its insurance policy to defendant Arthur Allen McKinzie which insured the said Arthur Allen McKinzie against public liability for personal injuries or property damage arising out of the operation of his 1951 Cadillac coupe automobile.

II.

On or about the 8th day of June, 1957, near Toledo, Oregon, the defendant Arthur Allen McKinzie, while operating his motor vehicle which was

covered and insured by said insurance policy, was involved in a collision with the automobile owned and operated by Robert Dean Gilmont, and said collision resulted in personal injuries to all of the defendants Gilmont and damage to the automobiles owned by defendant Arthur Allen McKinzie and defendant Robert Dean Gilmont and said collision and personal injuries and damages occurred as a proximate result of the carelessness and negligence of defendant Arthur Allen McKinzie.

III.

Plaintiff received notice and knowledge of said accident immediately following said collision and thereafter investigated the facts and circumstances involved in said collision, and defendants are informed and believe and therefore allege that at said time the plaintiff knew or, in the exercise of reasonable care, should have known that defendant Arthur Allen McKinzie was operating his automobile without a valid driver's license from the State of Oregon.

IV.

Prior to said automobile accident and on or about the 7th day of June, 1957, plaintiff notified defendant Arthur Allen McKinzie that his automobile insurance would be canceled on June 14, 1957, unless a certain balance of the premium was paid before said cancellation date and thereafter and on or about the 28th day of June, 1957, plaintiff notified defendant Arthur Allen McKinzie that his automobile insurance was not in force because the pre-

mium had not been paid prior to the cancellation date.

V.

On or about the 26th day of July, 1957, plaintiff obtained proof of loss from defendant Arthur Allen McKinzie wherein the said Arthur Allen McKinzie released the plaintiff from all claims for damage to his 1951 Cadillac automobile which had resulted from said collision, and on or about July 31, 1957, plaintiff paid Arthur Allen McKinzie and City Finance Company the sum of $945.45 in full satisfaction of said claim for property damage.

VI.

Plaintiff further failed to notify the Department of Financial Responsibility of the State of Oregon until October 29, 1957, that it was denying coverage under said insurancy policy.

VII.

At all times mentioned herein, the plaintiff, by and through its adjusters, negotiated with the attorneys for defendants Gilmont with respect to said personal injury claim of defendants Gilmont as if said insurance policy was in full force.

VIII.

During the month of December, 1957, defendant Robert Dean Gilmont and Defendant Rose Marie Gilmont commenced an action against defendant Arthur A. McKinzie in the Circuit Court of the State of Oregon for the County of Lincoln to re-

cover damages for the personal injuries that they sustained as a result of the carelessness and negligence of the said Arthur A. McKinzie, and on or about the 15th day of January, 1958, the plaintiff assumed the defense of the said Arthur A. McKinzie in the Circuit Court of the State of Oregon for the County of Lincoln and appeared therein by and through its attorneys and is presently defending the said Arthur A. McKinzie in said action for damages.

IX.

By reason of the foregoing acts and conduct, the plaintiff has waived any claimed defense under said insurance policy and it is barred and estopped from maintaining this suit or denying coverage under said insurance policy.

And for a second separate and affirmative answer and defense, Defendants Gilmont allege:

I.

Defendants Gilmont reallege paragraphs I, II, III, IV, V, VI, VII and VIII of their first separate and affirmative answer and defense and incorporate the same herein by reference as though fully set forth herein.

II.

Plaintiff has been guilty of laches and has further affirmed its contract of insurance with defendant Arthur A. McKinzie and is not entitled to rescind its insurance contract or the coverage under its insurance policy.

Wherefore, having fully answered plaintiff's complaint, defendants Gilmont pray that the same be dismissed and that plaintiff take nothing thereby and that these answering defendants be awarded their costs and disbursements incurred herein.

CRUM, WALKER & BUSS,
/s/ HOLLIE PIHL,
KRAUSE, LINDSAY & KENNEDY,
/s/ JACK L. KENNEDY,
Attorneys for Defendants Gilmont.

Duly Verified.

[Endorsed]: Filed March 10, 1958.

Plaintiff's Requested Instruction No. 1

If you find that defendant McKinzie failed to truthfully disclose in his answers to the questions in his application that any driver's license had previously been revoked or suspended, that he had received any driving charges, citations or fines during the three years prior to April 16, 1957, or that he had been involved in any auto accident as a driver during those three years, such failure to disclose these facts would constitute a concealment of a material fact, which would as a matter of law effect the acceptance of risk and the hazard assumed by the plaintiff insurance company, and would bar the recovery of all defendants on the policy here in question. It is not necessary that the plaintiff prove that all of these questions were answered falsely but it is sufficient if it is proven that any one of them was made and that it was false.

Plaintiff's Requested Instruction No. 2

Defendants Gilmont have contended and set up by way of defense to this action that plaintiff was negligent in obtaining and completing the application for insurance from defendant Arthur Allen McKinzie. You are instructed that there is no evidence from which you could find that plaintiff was negligent in obtaining and completing the application for insurance from defendant McKinzie and you will therefore completely disregard this contention and defense in determining this case.

Plaintiff's Requested Instruction No. 11

I instruct you as a matter of law that it was incumbent upon defendant McKinzie to give truthful answers to the questions put to him in the application which he signed and that in failing to give truthful answers to these questions he has misrepresented material facts upon which the plaintiff was entitled to rely. Therefore if you find that the plaintiff did rely upon these representations in issuing the policy, then none of the defendants herein can recover on the policy.

[Title of District Court and Cause.]

VERDICT

We, the jury, duly empaneled and sworn to try the above-entitled cause, return our verdict in favor of the defendants Gilmont.

Dated this 20th day of June, 1958.

/s/ OTTO T. HOGG,
Foreman.

[Endorsed]: Filed June 20, 1958.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND FOR A NEW TRIAL

Pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure plaintiff moves the court for an order setting aside the verdict heretofore received and filed and for the entry of judgment in favor of plaintiff notwithstanding said verdict.

This motion is made on the grounds and for the reason that plaintiff's motion for a directed verdict should have been granted because:

(1) There was no evidence that the plaintiff was negligent in obtaining and completing the application for insurance from defendant McKinzie;

(2) There was no evidence which would authorize a jury to return a verdict against plaintiff;

(3) The evidence in the case was uncontradicted and conclusively proved that defendant McKinzie intentionally made a false and material representation for the purpose of inducing the plaintiff to issue its automobile liability policy and that plaintiff, acting in reliance thereon, has suffered injury.

In the event that the foregoing motion is denied plaintiff then moves, in the alternative, for an order granting a new trial.

Plaintiff's motion for an order granting a new trial is made upon the following grounds:

(1) The verdict was against the overwhelming weight of the evidence;

(2) The verdict was based upon the court's instruction to the jury that they could find for defendants on either one of two theories, one of which would not support a recovery under the facts;

(3) The verdict returned and filed herein is in favor of defendants Gilmont only. No judgment can be entered herein in favor of defendant McKinzie for the reason there is no verdict upon which to base such a judgment. Under the law of the case defendants Gilmonts' rights are derivative from defendant McKinzie and therefore the verdict is defective and no judgment in favor of the defendants, or any of them, can be entered thereon;

(4) There is absolutely no evidence from which a jury could find that the plaintiff was careless and negligent in obtaining and completing the application for insurance from defendant McKinzie

and defendants Gilmont therefore failed to bear the burden of proof upon this issue and the same should not have been submitted to the jury;

(5) The uncontradicted evidence proved that defendant McKinzie made false representations in the application and this issue should not have been submitted to the jury;

(6) The uncontradicted evidence proved that one or more of the representations were material and any finding by the jury that the same were not material must have been arbitrarily based upon conjecture and speculation notwithstanding the overwhelming evidence to the contrary.

/s/ FRANK McK. BOSCH,
Attorney for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 27, 1958.

[Title of District Court and Cause.]

ORDER

This matter came on for hearing upon the plaintiff's motion for judgment in its favor notwithstanding the verdict herein or in the alternative for a new trial, and the Court having considered the written memoranda filed and the oral statements of counsel and not being advised in the matter, took the matter under advisement, and the Court now being advised,

It Is Hereby Considered, Adjudged and Ordered that the aforesaid motion and the alternative are each hereby denied.

Dated November 3, 1958.

/s/ WILLIAM G. EAST,
United States District Judge.

[Endorsed]: Filed November 3, 1958.

[Title of District Court and Cause.]

COST BILL

Statement of costs and disbursements claimed by defendants Gilmont in the above-entitled cause:

Attorneys' docket fees	$20.00
Deposition of Donald Eugene Dorris	31.00*
Deposition of Rueben Edward Snyder	28.00

*[Note: This line deleted with notation "See Order dated 12/15/58.]

Director of Motor Vehicles, certified copy of driving record of Arthur A. McKinzie	1.00
Witness Fees:	
Sgt. William Colbert, 1 day, 230 miles...	22.40
Total.....	$71.40

December 23, 1958.
Costs taxed at $71.40.

R. DE MOTT,
Clerk,
/s/ By V. O. BISHOP,
Chief Deputy.

United States of America
District of Oregon—ss.

I, Jack L. Kennedy, being first duly sworn, depose and say that I am one of the attorneys for the defendants Gilmont in the within-entitled cause, that the disbursements set forth herein have been necessarily incurred in the defense of said cause, and that the defendants Gilmont are entitled to recover the same from the plaintiff.

/s/ JACK L. KENNEDY.

Subscribed and sworn to before me this 7th day of November, 1958.

[Seal] /s/ IRENE M. PERALA,
Notary Public for Oregon. My commission expires April 10, 1962.

Notice

To: Mayflower Insurance Exchange, Plaintiff, and to Arthur S. Vosburg and Frank McK. Bosch, its attorneys:

Please take notice that the defendants Gilmont will apply to the Clerk of the above-entitled court to have the within cost bill taxed on November 12, 1958, at the hour of 10:00 a.m.

/s/ JACK L. KENNEDY
Of Attorneys for Defendants Gilmont.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed November 7, 1958.

[Title of District Court and Cause.]

ORDER OF DEFAULT

This matter coming on for hearing before the undersigned Judge on November 21, 1958, on the motion of plaintiff for the entry of an Order of Default and Judgment against defendant McKinzie; plaintiff appearing by one of its attorneys, Frank McK. Bosch, and defendants Gilmont appearing by and through one of their attorneys, Jack L. Kennedy; and the court having heard the arguments of respective counsel and being fully advised in the premises;

Now Therefore, It Is Hereby Ordered and Adjudged that an Order of Default be and it is hereby entered against defendant Arthur Allen McKinzie.

Dated November 21, 1958.

/s/ WILLIAM G. EAST,
District Court Judge.

[Endorsed]: Filed December 2, 1958.

United States District Court
District of Oregon
Portland 5, Oregon

William G. East
United States District Judge

December 2, 1958

Mr. Jack L. Kennedy, Krause, Lindsay & Kennedy, Attorneys at Law, Portland Trust Building, Portland 4, Oregon

Mr. Frank McK. Bosch, Vosburg, Joss, Hedlund & Bosch, Attorneys at Law, 909 American Bank Building, Portland 5, Oregon

Re: Mayflower Insurance Exchange v. Arthur Allen McKinzie, et al. Civil No. 9405.

LETTER OPINION

Gentlemen:

This will acknowledge the letter of Mr. Kennedy under date of November 24 enclosing a form of judgment order. Also the letter of Mr. Bosch under date of November 26 enclosing a proposed form of order of default as to the defendant McKenzie, and likewise Mr. Kennedy's letter under date of No-

vember 29 in opposition to the request of Mr. Bosch in his letter of November 26.

It is my belief that pursuant to Rule 55 (b) (2) of the Federal Rules of Procedure, the plaintiff is entitled to have the Court enter an order of default against the defendant McKinzie for his failure to plead or otherwise appear in the action. At the hearing on November 21 I was under the impression that the Clerk could enter the default, but, inasmuch as the claim of the plaintiff was not liquidated, I feel that subsection (2) of Rule 55 applies. This Court is of the opinion that the defendant McKinzie, by his failure to appear in this cause, can in nowise defeat what legal claims the defendants Gilmont might have against the plaintiff by reason of the plaintiff's insurance policy issued to the defendant McKinzie and which the Court held to have been in full force and effect as of the date of the accident from which arose the claims of the defendants Gilmont against the defendant McKinzie and his insurer in the event of a judgment upon the merits against the defendant McKinzie.

This Court feels that the plaintiff is entitled to have an order of default against the defendant McKinzie in the form submitted in Mr. Bosch's letter under date of November 26. Therefore, the order has been entered as of November 21 in conformity with the Court's oral statement.

This Court feels that this order of default is in nowise an order constituting a determination of the merits of the alleged cause of action of the defendants Gilmont against the defendant McKinzie and

is merely a determination of the status of the plaintiff's policy of insurance issued to the defendant McKinzie as of the times and dates involved in the litigation before this Court.

Accordingly, the judgment order as submitted in Mr. Kennedy's letter under date of November 24 is entered as of this date of December 2.

Very truly yours,

/s/ WILLIAM G. EAST.

[Endorsed]: Filed December 2, 1958.

In the United States District Court
for the District of Oregon

Civil No. 9405

MAYFLOWER INSURANCE EXCHANGE,
Plaintiff,

vs.

ARTHUR ALLEN McKINZIE, ROBERT DEAN GILMONT, ROSE MARIE GILMONT, and SUSAN ROSE GILMONT, a minor, ROBERT RUSSELL GILMONT, a minor, and NORMAN I. GILMONT, a minor, by RONALD A. WATSON, Guardian ad Litem for said minors, Defendants.

JUDGMENT ORDER

The above-entitled cause having come on regularly for trial on the 18th day of June, 1958, before

the undersigned Judge of the above-entitled Court, plaintiff appearing by R. T. Carlson, its underwriting manager, and by Arthur S. Vosburg and Frank McK. Bosch, its attorneys, and defendants Robert Dean Gilmont and Rose Marie Gilmont appearing in person and by Jack L. Kennedy and Hollie Pihl, their attorneys, and defendants Susan Rose Gilmont, Robert Russell Gilmont and Norman I. Gilmont appearing by Ronald A. Watson, their guardian ad litem, and by Jack L. Kennedy and Hollie Pihl, their attorneys, and defendant Arthur Allen McKinzie appearing neither in person nor by counsel, and a jury having been duly selected and sworn to try the above-entitled cause, the parties each having made opening statements, adduced evidence in support of their contentions, certain objections and motions having been made during the trial and ruled on by the Court and thereafter the matter having been argued to the jury and the jury having been duly instructed and having retired and thereafter returned with its verdict which omitting the caption and title was as follows:

> "We, the jury, duly empaneled and sworn to try the above-entitled cause, return our verdict in favor of the defendants Gilmont.
>
> "Dated this 20th day of June, 1958.
>
> Otto Hogg
> Foreman"

and thereafter the jury having been polled and each member of said jury having stated that this

was their verdict and said verdict being duly received and filed by the Court and thereafter the plaintiff having filed a motion for judgment notwithstanding the verdict and in the alternative for a new trial, and the Court having considered memoranda and oral statements of counsel and having taken the matter under advisement and on the 3rd day of November, 1958, having denied plaintiff's motion for judgment notwithstanding the verdict or in the alternative for a new trial and thereafter on the 21st day of November, 1958, the plaintiff having moved the Court for an order of default against defendant Arthur Allen McKinzie and the Court on the same date having directed that the default of the defendant Arthur Allen McKenzie be entered of record herein, and the Court now being fully advised:

Now Therefore, it is hereby Ordered and Adjudged that plaintiff's complaint for a declaratory judgment be and the same is hereby dismissed and that plaintiff take nothing herein against the defendants.

It is further Ordered and Adjudged that policy No. 174380 issued by plaintiff, Mayflower Insurance Exchange, on or about April 16, 1957, to Arthur A. McKinzie be and the same is hereby declared to be a valid policy of insurance and in full force and effect and binding on the plaintiff on or about June 8, 1957, being the date of an automobile accident between automobiles operated by defendant Arthur Allen McKenzie and defendant Robert Dean Gilmont.

It is further Ordered and Adjudged that plaintiff was and is under a duty and obligation to defend defendant Arthur Allen McKinzie in any action, suit or proceedings that may be pending or brought or instituted against him arising out of said automobile accident which occurred on or about June 8, 1957, at a point on U. S. Highway No. 20 approximately 6.5 miles east of Toledo, Oregon.

It is further Ordered and Adjudged that plaintiff is under a duty and obligation to pay any judgment that may be entered against defendant Arthur Allen McKinzie arising out of said automobile accident to and including the amount of insurance contained in said insurance policy.

It is further Ordered and Adjudged that defendants Robert Dean Gilmont and Rose Marie Gilmont and Susan Rose Gilmont, Robert Russell Gilmont and Norman I. Gilmont, and each of them, are not restrained and are entitled to institute legal proceedings against plaintiff for the recovery of the amount of any judgment that said defendants, or any of them, may obtain against defendant Arthur Allen McKinzie to and including the amount of insurance contained in said insurance policy.

It is further Ordered and Adjudged that defendants Gilmont have, take and recover judgment of and from the plaintiff for their costs and disbursements incurred herein taxed and allowed in the sum of $..... and that execution issue therefor.

Dated this 2nd day of December, 1958.

/s/ WILLIAM G. EAST,
United States District Judge.

Presented by:

/s/ JACK L. KENNEDY
Of Attorneys for Defendants Gilmont.

[Endorsed]: Filed December 2, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Mayflower Insurance Exchange, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 2, 1958.

/s/ FRANK McK. BOSCH
Of Attorneys for Plaintiff,
Mayflower Insurance Exchange.

[Endorsed]: Filed December 30, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents: That we, Mayflower Insurance Exchange, as Principal, and American Insurance Company, a New Jersey Corporation authorized to act as surety under the laws of the State of Oregon, are bound to pay to Robert

Dean Gilmont, Rose Marie Gilmont and Ronald A. Watson, Guardian ad Litem for Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor, and Norman I. Gilmont, a minor, the sum of Two Hundred Fifty Dollars ($250.00);

Whereas the plaintiff is about to appeal to the Court of Appeals for the Ninth Circuit from the judgment of this court entered on December 2, 1958, Therefore the Condition of This Bond Is that if the plaintiff shall pay all costs adjudged against it, if its appeal is dismissed, or said judgment affirmed, or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated this 30th day of December, 1958.

MAYFLOWER INSURANCE
EXCHANGE,
Plaintiff,
/s/ By FRANK McK. BOSCH,
One of Its Attorneys,
Principal.

[Seal] AMERICAN INSURANCE
COMPANY,
/s/ By STANLEY P. DWYER,
Surety.

Countersigned:
/s/ C. R. RATHBURN,
Oregon Resident Agent.

[Endorsed]: Filed December 30, 1958.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE RECORD AND DOCKET APPEAL

Comes now plaintiff, appearing by and through one of its attorneys, Frank McK. Bosch, and moves the court for an order extending until March 9, 1959, the time for filing the Record on Appeal herein with the United States Court of Appeals for the Ninth Circuit and for docketing the Appeal taken by plaintiff by its Notice of Appeal filed herein on December 30, 1958. In support thereof plaintiff's said attorney has been advised by Mr. Jack Ellis, the court reporter who reported the testimony of the witnesses at the trial of the above entitled action, that due to prior commitments for transcripts of earlier proceedings in other cases that he will not be able to complete transcribing the testimony of said witnesses until February 25, 1959. That the time originally prescribed by Rule 73 (g) of the Federal Rules of Civil Procedure has not yet expired and no previous extension of time has been heretofore granted. That the Record of Appeal herein cannot be designated by plaintiff until after its attorneys have had reasonable time to examine the transcribed testimony.

/s/ FRANK McK. BOSCH,
Attorneys for Plaintiff.

It Is Hereby Stipulated by all of the defendants Gilmont, acting by and through one of their attor-

neys of record, that subject to the approval of the court, plaintiff may have an extension of time as requested above.

/s/ JACK L. KENNEDY
Of Attorneys, Defendant
Gilmont.

[Endorsed]: Filed January 20, 1959.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD AND DOCKETING APPEAL

Upon motion of Plaintiff supported by stipulation of defendants Gilmont, and good cause appearing therefrom and the court being fully advised;

Now, Therefore, It Is Hereby Ordered that the time for filing the Record on Appeal herein with the United States Court of Appeals for the Ninth Circuit and for docketing therein the Appeal taken by plaintiff by its Notice of Appeal filed December 30, 1958, is hereby extended to March 9, 1959, pursuant to Rule 73 (g) of the Federal Rules of Civil Procedure.

Dated this 20th day of January, 1959.

/s/ WILLIAM G. EAST,
Judge.

[Endorsed]: Filed January 20, 1959.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN THE RECORD ON APPEAL

Appellant Mayflower Insurance Exchange, designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Complaint and Summons.
2. Answer of defendants Gilmont.
3. Amended and Supplemental Answer of defendants Gilmont.
4. Pretrial Order.
5. Verdict.
6. Motion for Judgment notwithstanding the Verdict and for a New Trial.
7. Order Denying Motion for Judgment notwithstanding the Verdict and for a New Trial.
8. Order of Default against defendant McKinzie.
9. Judge East's letter of Opinion dated December 2, 1958.
10. Judgment Order.
11. Cost Bill.
12. Notice of Appeal.
13. Bond for Costs on Appeal.
14. Motion for Extension of Time Within Which to File Record and Docket Appeal.
15. Order Extending Time for Filing Record and Docketing Appeal.
16. Reporter's Transcript of the Trial Testimony, Evidence and Proceedings at the Trial.

17. All Exhibits Offered and Received in Evidence.

18. Instructions Requested by Plaintiff Mayflower Insurance Exchange Nos. 1, 2 and 11.

19. Statement of Points Upon Which Appellant Will Rely.

20. This Designation of Record.

21. Motion and Stipulation for Order to Transport Original Exhibits.

22. Order to Transport Original Exhibits.

/s/ FRANK McK. BOSCH,
Of Attorneys for Appellant
Mayflower Insurance Exchange.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 4, 1959.

[Title of District Court and Cause.]

MOTION AND STIPULATION FOR ORDER TO TRANSPORT ORIGINAL EXHIBITS

Comes now the plaintiff by and through one of its attorneys, Frank McK. Bosch, and moves the court for an order directing the Clerk of the above entitled court to transport to the Clerk of the United States Court of Appeals for the Ninth Circuit the original of all exhibits offered and received in evi-

dence for the inspection and use of the Appellate Court in lieu of copies thereof and for their care, custody and control and return in the same manner in which they are sent.

In support of this motion plaintiff, by and through one of its attorneys, Frank McK. Bosch, represents that an appeal has been taken in the above entitled matter from the above entitled court to the United States Court of Appeals for the Ninth Circuit and that it is plaintiff's belief that the Appellate Court would gain a better understanding by having said original exhibits before them for their inspection and use and further that there will be a saving of cost if said originals are sent to the Clerk of the Appellate Court rather than having copies made thereof.

/s/ FRANK McK. BOSCH,
Of Attorneys for Plaintiff.

It Is Hereby Stipulated that defendants' Gilmont, acting through one of their attorneys of record, that subject to the approval of the Court, the foregoing Motion may be granted.

/s/ JACK L. KENNEDY,
Of Attorneys for Defendants' Gilmont.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 4, 1959.

[Title of District Court and Cause.]

ORDER TO TRANSPORT ORIGINAL EXHIBITS

Upon the motion of plaintiff, support by the stipulation of the defendants' Gilmont, and good cause appearing therefrom, and the court being fully advised;

Now, Therefore, It Is Ordered that the Clerk of the above entitled Court is authorized and directed to transport all of the original exhibits offered and received in the trial of the above entitled case for the inspection and use of the Appellate Court in lieu of copies thereof and for the care, custody and control and return of said original exhibits in the same manner in which they are sent.

Dated this 4th day of March, 1959.

/s/ WILLIAM G. EAST,
District Judge.

[Endorsed]: Filed March 4, 1959.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT MAYFLOWER INSURANCE EXCHANGE INTENDS TO RELY ON APPEAL

On appeal appellant Mayflower Insurance Exchange will rely on the following points:

I.

The court erred, after defendants had rested, in denying plaintiff's motion for a directed verdict against all defendants on the grounds and for the reason that:

(a) The evidence clearly and conclusively proved all of the allegations of plaintiff's complaint so that there was no issue to be submitted to the jury and therefore plaintiff was entitled to a directed verdict.

(b) Defendants, and each of them, had failed to adduce any evidence whatsoever negating the right of plaintiff to the relief requested in its complaint so that there was no issue to be submitted to the jury and plaintiff was entitled to a directed verdict.

(c) Defendant McKinzie had not denied any of the allegations of plaintiff's complaint.

II.

The court erred in entering judgment based upon the verdict rendered on the grounds and for the reason that:

(a) The evidence clearly and conclusively proved all of the allegations of plaintiff's complaint so that there was no issue to be submitted to the jury and therefore plaintiff was entitled to a directed verdict.

(b) Defendants, and each of them, had failed to adduce any evidence whatsoever negating the right of plaintiff to the relief requested in its complaint so that there was no issue to be submitted to the jury and plaintiff was entitled to a directed verdict.

(c) The verdict rendered was defective in that it was in favor of defendants Gilmont only and did

not mention the defendant McKinzie, against whom an order of default had been entered.

(d) The verdict rendered did not authorized a judgment in favor of defendants Gilmont and against plaintiff.

III.

The court erred in denying plaintiff's motion for a judgment notwithstanding the verdict on the grounds and for the reason that:

(a) The evidence clearly and conclusively proved all of the allegations of plaintiff's complaint so that there was no issue to be submitted to the jury and therefore plaintiff was entitled to a directed verdict.

(b) Defendants, and each of them, had failed to adduce any evidence whatsoever negating the right of plaintiff to the relief requested in its complaint so that there was no issue to be submitted to the jury and plaintiff was entitled to a directed verdict.

(c) Defendant McKinzie had not denied any of the allegations of plaintiff's complaint.

IV.

The court erred in denying plaintiff's motion for a new trial because of errors of law occurring at the trial duly excepted to by the plaintiff, to-wit:

(a) The court failed to give plaintiff's requested instruction No. 2 reading as follows:

"Defendants Gilmont have contended and set up by way of defense to this action that plaintiff was negligent in obtaining and completing the application for insurance from defendant Arthur Allen

McKinzie. You are instructed that there is no evidence from which you could find that plaintiff was negligent in obtaining and completing the application for insurance from defendant McKinzie and you will therefore completely disregard this contention and defense in determining this case.

(b) The court erred in instructing the jury as follows:

"Now members of the jury, there is a second issue which is raised by the contention of the defendants Gilmont as to whether or not the agent at the time he took the answers from McKinzie acted with ordinary, reasonable care for the protection of his own company, and in that connection you are charged that the defendants Gilmont have charged that the plaintiff, acting through the agent who took the application, was careless and negligent in obtaining and completing the application of insurance from McKinzie.

"You are instructed, members of the jury, that negligence as ordinarily defined, is a failure to do that which an ordinary, reasonable prudent person would do under the same or similar circumstances, or doing that which an ordinarily reasonable prudent person would not do under the same or similar circumstances.

"Therefore, if you should find from the evidence that the plaintiff, acting through its agent, was careless and did not act as a reasonably prudent person, being an insurance company, in obtaining

the answers from McKinzie while filling out the application for insurance by Mr. McKinzie, and thereby blindly or recklessly put down defendant's answers to the questions without reasonable credulence, you should then find that the plaintiff is not entitled to be relieved of obligation under its policy because then through such action and conduct he would have been, become a party to the transaction.

"However, if you find that the plaintiff's agent while taking down the answers acted reasonably in accepting the answers given to him by McKinzie, then McKinzie is bound by his own doings as you shall find them from all of the evidence in the case subject to these instructions."

Transcript of Proceedings p. 260-261.

(c) There is no evidence from which the jury could find that plaintiff was negligent in obtaining and completing the application of insurance from defendant McKinzie.

(d) The court failed to give plaintiff's requested instruction No. 11 reading as follows:

"I instruct you as a matter of law that it was incumbent upon defendant McKinzie to give truthful answers to the questions put to him in the application which he signed and that in failing to give truthful answers to these questions he has misrepresented material facts upon which the plaintiff was entitled to rely. Therefore if you find that the plaintiff did rely upon these representations in issuing the policy, then none of the defendants herein can recover on the policy."

(e) The verdict was against the overwhelming weight of the evidence.

Respectfully submitted,

/s/ ARTHUR S. VOSBURG,
/s/ FRANK McK. BOSCH,
Attorneys for Appellant
Mayflower Insurance Exchange.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 5, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint for Declaratory Judgment, Summons, Answer of defendants Gilmonts (offered and received as plaintiff's exhibit No. 21), Pretrial Order, Amended and Supplemental Answer of defendants Gilmonts (offered and received as Defendant's Exhibit No. 34), Verdict, Motion for judgment notwithstanding the verdict and for a new trial, Order on motion for judgment notwithstanding verdict and for new trial, Defendants' Cost Bill, Order of Default as to defendant Arthur Allen McKinzie, Judge East's Letter Opinion, Judgment Order, Notice of

Appeal, Bond for Costs on Appeal, Motion for extension of time to file and docket appeal, Order extending time for filing and docketing appeal, Appellant's designation of portions of record, Motion and Stipulation for order to transport original exhibits, Order to Transport original Exhibits, Statement of Points and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 9405, in which Mayflower Insurance Exchange is plaintiff and appellant, and Robert Dean Gilmont, et al. are defendants and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and in accordance with the rules of this court.

I further certify that there is enclosed herewith defendants' Exhibits numbered 21, 22, 24, 25, 26, 27, 28, 29, 30, 33, 35, 36, 37, 38, and 39; and plaintiff's Exhibits numbered 1, 2, 3, 7, 8, 9, 18, 19a, 19b, 19c, 19d, 22 and 23. Also enclosed are plaintiff's requested instructions numbered 1, 2 and 11, being number 18 of appellant's designation and not filed in this office.

I further certify that we are mailing under separate cover the reporter's transcript of testimony, dated June 18, 19, 20, 1958, filed in this office in this cause.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my

hand and affixed the seal of said court in Portland, in said District, this 5th day of March, 1959.

[Seal] R. DeMOTT,
Clerk,

/s/ By MILDRED SPARGO,
Deputy Clerk.

United States District Court,
District of Oregon

Civil No. 9405

MAYFLOWER INSURANCE EXCHANGE,
Plaintiff,

vs.

ARTHUR ALLEN McKINZIE, ROBERT DEAN GILMONT, et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

Before Honorable William G. East, U. S. District Judge.

U. S. Courthouse
Portland, Oregon
June 18, 19, 20, 1958

Appearances: Messrs. Frank Bosch and Arthur S. Vosburg, Attorneys for Plaintiff; Messrs. Jack L. Kennedy and Hollie Pihl, Attorneys for Defendants Gilmont.

(Whereupon the following proceedings were had:) [1]*

The Court: This is the time fixed for the trial of Mayflower Insurance Exchange vs. Arthur Allen McKinzie and others. Now, I will say to counsel that I am still engaged and will be for some several hours yet today on this case that was being tried yesterday. So, at this time we can select a jury and then recess the matter until we finish this other matter. Counsel ready?

Mr. Bosch: Plaintiff is ready, your Honor.

Mr. Kennedy: Defendants Gilmont are ready, your Honor.

If the Court please, Mr. Ronald Watson, a member of the bar of this court, was appointed guardian ad litem——

The Court: Yes.

Mr. Kennedy: ——for the minor children of Mr. and Mrs. Gilmont. He is presently in the court at this time. Of course, he will not be a witness. I wondered if he could be excused.

The Court: Do you wish to be excused, Mr. Watson?

Mr. Watson: Well, I don't believe there is any reason for me to be here unless your Honor would wish me here.

The Court: No. I don't know of any reason. I think we can protect the minors' interest on the

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* Page numbers appearing at top of page of Reporter's Transcript of Record.

selection of the jury. So if you wish to be excused you may be so excused.

Mr. Watson: Thank you, your Honor.

Mr. Kennedy: Thank you, your Honor.

The Court: Call the jury. [2]

(At this point a jury was called, selected, and sworn to try the case.)

The Court: Plaintiff's opening statement.

Mr. Bosch: Your Honor, and Ladies and Gentlemen of the jury: As you know this is the point at which the respective attorneys take the opportunity of advising you what their respective cases are about, what they will expect to prove, and in general just give you a little thumbnail sketch of what you can expect to hear as the case proceeds.

It might help you as you listen to the testimony and hear the evidence that will be brought before you here today and tomorrow to know a little bit about the circumstances which give rise to this lawsuit. As the Court told you this morning, it is what we call a declaratory judgment suit which was initiated by Mayflower Insurance Exchange, and that is an insurance company. We will more or less be referring to it more or less back and forth as the insurance company in this case and a man named Arthur Allen McKinzie who is referred to as the insured or the alleged insured and various members of the Gilmont family.

This case is somewhat unique in this respect that Mr. McKinzie who is named as one of the defendants, he was served with a summons and complaint here, and who is a very important party to this

case, has not appeared. He does not appear in person nor by his attorneys. However, we do have [3] the deposition of Mr. McKinzie which is, as you know, a question and answer thing which was taken by myself and Mr. Kennedy some time ago in preparation of the trial.

We have also a number of other documents which were concerned with Mr. McKinzie at one stage or another of this case.

In the chronological sequence of the facts which bring us up to the trial of this case, I probably should correctly start with the events which occurred in April of 1957 on the 16th day. That is the day that Mr. McKinzie presented himself to the southeast district office of Mayflower Insurance Exchange, advised the representative that was on duty at that time that he wished to have the company issue to him an automobile liability policy.

I am sure that most of you are familiar with what that is. It's intended to protect a person in the operation of his automobile from liability which may accrue because of injury to other parties.

This particular policy also afforded him some coverage for property damage. Now, the way these things are started and, perhaps, most of you know this, is that the agent who had never seen Mr. McKinzie before, Mr. McKinzie had no prior dealings with this particular insurance company—so they were strangers to each other. The agent picked out what we will call an application. Almost all companies use [4] them. I don't know of any company that wouldn't. That is the prime purpose for

getting the information necessary to permit the company to make a decision as to whether they will write this particular policy or not.

It of course starts out with very pertinent facts as to the name and the address and occupation and then goes on as to what kind of coverage he wants, a description of his automobile, and goes on to certain other salient facts which are necessary for the company to make their decision.

Some of these are down in the body of the application and they refer to previous driving record, whether he had any suspensions or revocations of his license, and any citations, any previous insurers. In other words, facts which would permit the company to determine whether they want to write this kind of a policy or not, or this kind of a risk.

Now, in this application as it will develop before you, Mr. McKinzie for reasons I suppose that are best known to him gave negative answers to each one of these questions. And as it turned out later when the company had knowledge of it, a number of these questions were false and materially so. I mean, it wasn't just a matter of an inadvertence, overlooking one parking ticket, or something like that. They were rather substantial violations, accidents, and whatnot, that he had a complete blank on. [5]

Then to cut short somewhat, this application goes to the home office of the company in Seattle and in due course they issued to Mr. McKinzie the policy which he applied for. And, things go on then for some time until June 8th of that same year when

Mr. McKinzie was driving his automobile here on one of the state highways on his way from, as I remember, the Coast, inland. He was on his way to Dallas, as I recall. And some place down there there was a head-on automobile accident. The other automobile was owned and operated by Mr. Gilmont and he was at that time accompanied by the members of his family. There was property damage and personal injuries to occupants of both automobiles.

The matter came to the attention of the insurance company first, as I recall, on some information from the people at the hospital where some of the injured parties were taken. And, in due course the file was referred to the adjusting department of the insurance company and an adjuster went out on the road down to the scene of the accident to determine what he could about the facts and also as to who was injured and the extent of those injuries.

To cut, again, somewhat short a long, detailed story of the investigation of the facts of this accident, suffice it to say that in the course of investigating this accident the company first learned by information from the State of Oregon that Mr. McKinzie had falsely represented to [6] them the fact that he had been suspended by the State of Oregon on his Oregon permit; that he had had a citation within three years prior to the time of this application. And then when we took the deposition of Mr. McKinzie, which I have referred to before, it further developed that not only were there

citations here in Oregon and a suspension, but there were also violations down in the State of California.

He also told us then for the first time that he had had previous insurers. And I think that's about all.

But, in any event, for the first time some time after the accident the company was advised that Mr. McKinzie had misrepresented to them his capacity to be insured in this company.

Now, as the Court will instruct you, in a case like this it is necessary for these various questions to have some materiality to the risk. It certainly isn't important if a man asked an applicant for insurance if his eyes are blue and he answers that they are brown. That has nothing to do with the risk. But, these questions as to his prior driving record, his prior insurance carriers, his various citations and violations of the law in driving his automoble—and we are not talking about parking citations—those things are all very important to these insurance companies.

I assume that you are all familiar with our current [7] automobile policy rates. It's becoming more important that these companies try to get what they refer to as good risks. And that's why they ask these questions. They are not idly asked.

So, as soon as the company determined that they had been acting upon false information they immediately wrote to Mr. McKinzie—and this is after the accident—wrote to Mr. McKinzie, tendered to him the premium which he had originally paid the date he signed the application, and advised him

that they were then electing to disaffirm the contract and consider it to be void in the first instance, for the reason that they had written it in reliance upon his false, fraudulent representations.

It is not sufficient for the company, of course, to just write Mr. McKinzie a letter to that effect. The matter doesn't rest there. That's what brings us to this court for a judicial determination as to whether or not the company was entitled under these particular facts to disaffirm the contract, consider it to be void with the effect that they will disclaim any responsibility for this particular accident or to the parties who were injured in it.

Naturally, the Gilmonts will bring before you certain facts which they will expect to persuade you with to a different result than I have given you. But I think it is most important in this case for you members of the jury to [8] keep in mind that the way this case should hang or turn should be determined on what was done the day that this man walked in to make his application for the insurance. If he gave at that time false information which was material then and the company relied upon that and issued the policy, then anything that comes after that is, to my mind, not important.

In other words, if he told the truth we are prepared to establish that the policy would never have been written and we wouldn't be here today. But he didn't tell the truth and the company issued the policy in reliance on his statements and the company should not be obliged to accept a liability which they

find themselves potentially in because of the misrepresentations of Mr. McKinzie.

Putting it quite simply, McKinzie should not be able to take advantage of his own misleading statements. All we can ask, however, in this case is that you members of the jury remember your oath and that is to consider the testimony which you will hear here; that together with the documentary evidence, and then weigh all those impartially as best you can under the instructions of the Court given you at the close of the case. We can expect no more and we ask no more. Thank you.

The Court: Defendants' opening statement.

Mr. Kennedy: If the Court please, Mr. Vosburg and Mr. Bosch, Ladies and Gentlemen: I am afraid my understanding [9] of the facts of the situation might be a little bit different in this case. I will say this before I commence, that it is my understanding of the purpose of this opening statement for the lawyers to give you a more or less bird's-eye view of what the case is all about and to tell you what the issues are involved in the case and what each side expects to prove.

Now, I have no intention of arguing the case at this time. I will be given the right to argue the case after you have heard all of the testimony.

Now, I might also mention one other comment which occurs quite often. Anything that I might say or that Mr. Bosch might say regarding the exhibits or regarding the witnesses isn't necessarily evidence in this case. I mean, the evidence will come from the witnesses on the witness stand and

the exhibits that are introduced. And you ladies and gentlemen have the province to determine exactly what the facts are. And as far as the law is concerned, such as materiality or right to rely on any statements in the application, Judge East will instruct you as to that. I mean, it isn't the lawyers' province to attempt to tell you what the law is.

Now, the parties, as you know, in this case are the Mayflower Insurance Exchange, the insurance company, which is a Washington insurance corporation, and, of course, it's authorized to issue insurance in this particular state. [10]

Mr. McKinzie entered into an insurance contract with the insurance company around about April 16th, I believe, 1957. All of the events occurred approximately a year ago.

The plaintiff and Mrs. Gilmont and their three minor children, residents of Toledo, Oregon, were, both of them, and their children, quite seriously injured in the automobile accident which has been referred to as having occurred on June 8th, 1957.

Now, I would like to go back just very briefly and give you a chronological course of events which occurred in this case and which I believe will be substantiated by the evidence. The application for the insurance was entered into and the policy was issued, I believe, effective April 16, 1957. Mr. McKinzie traded in an automobile at that time in to a parking lot here in Portland and he was referred, I believe, to Mayflower Insurance Company and to a finance company.

He arrived at the office of the finance company

quite late—excuse me—at the office of the insurance company quite late in the afternoon. I believe the evidence will show that it was approximately 6:00 o'clock. It was closing time. There was one man present, Mr. Snyder, who sits in the back of the courtroom. Mr. Snyder took the application and he wrote out the—he completed the whole application. I mean, he wrote out the names and make of [11] car, answered all of the questions, and Mr. McKinzie—Mr. McKinzie signed it. Excuse me. I have one of these summer colds that you can't get rid of.

In any event, the application was then submitted to the insurance company. In the normal course of events, of course, the policy was issued to Mr. McKinzie and for all intents and purposes I assume he imagined that he was insured.

What he secured was an insurance policy which insured him in the amount of $10,000 for any one—for any injuries to any one person, and $20,000 for injuries resulting out of any one accident, or all claims out of one accident.

Now, the accident occurred on June 8th, 1957, which was approximately about a little less than two months later. The accident occurred when Mr. McKinzie was on the wrong side of the road, ran head on into the Gilmont—Mr. and Mrs. Gilmont's automobile.

All the parties were seriously injured including Mr. McKinzie, and were taken to the hospital.

The insurance company received notice of the accident more or less immediately. I don't know how many days it was afterwards. I assume that

they will have testimony here of when they first heard of the accident.

In any event, they conducted an immediate investigation in the Toledo and Newport area, and in the course of that investigation, of course, they talked to the police [12] officer, they talked to everybody that they could, as I understand it, as the insurance companies normally do when they are investigating an automobile accident.

Thereafter they checked further with, I believe it was, Mr. McKinzie's neighbor, his landlady, obtained further information about him and continued their investigation until, oh, I believe it was more than a month later that they took a statement from Mr. McKinzie at the Veterans Hospital.

They entered into a release of his property damages with him, issued a check to the finance company and to Mr. McKinzie and they, of course, during that period of time continued to negotiate with Mr. Pihl who is representing the Gilmonts in this particular case, and no complaint had been filed at that time. I mention these facts because they are important in determining whether any reasonable delay occurred or whether the acts or conducts of the insurance company were such as to bar them from maintaining this particular proceedings.

But, during the course of the investigation quite early the first part of July, apparently, for some reason known to the insurance company, they felt that a further check should be made upon their insured, Mr. McKinzie. They at that time commenced writing letters to the Motor Vehicle Department to ob-

tain a record regarding his driver's license and any driving record that he might have. We have quite [13] a few letters. I believe they will be introduced in evidence. But, in any event letters went back and forth and it cost some dollars to obtain that report. For some reason the dollar was not sent and they did not acquire the report itself until September 3rd. On September 3rd they at that time apparently determined there was reason to—they felt that they might have grounds to rescind their obligation under the contract. They waited until September 23rd at which time they wrote a letter to Mr. McKinzie when he was in the Veterans Hospital. In that letter they advised him that they were rescinding coverage under the policy because they had discovered that at that time he took out the application that he did not have an Oregon driver's license. That was one ground.

The second ground was that they were entitled to rescind because Mr. McKinzie had been convicted of a traffic offense of no muffler. He did not have a muffler on in Corvallis, Oregon. Now, they continued. And because of those misrepresentations they thereby elected to rescind.

I differ a little bit with counsel as to the legal effect of these proceedings. I think it's a judicial determination of whether their rescission at that time was effective. And I believe myself that they are bound by the reasons that are set forth in their letter of rescission.

Now, shortly after this lawsuit was filed Mr. and [14] Mrs. McKinzie sometime, I believe, in Decem-

ber commenced an action to recover damages for the personal injuries, loss of wages, and the medical expenses that they sustained in Lincoln County, Oregon. That's where the accident occurred. The insurance company at that time entered into a defense of that case in Lincoln County and I believe they entered into some type of an agreement with Mr. McKinzie at that time as to whether they were or were no waiving any rights. And I assume that agreement will be in evidence.

That case in Lincoln County, of course, was just —nothing has happened. It's still pending, pending a determination of this case.

And I think the effect of this case is that—I mean, I think it is not an injury case to recover damages for personal injuries. What it is is that you ladies and gentlemen are to determine the facts as to whether the insurance company is or is not obligated to defend Mr. McKinzie under its insurance contract in connection with those damage cases which have been filed, or if a judgment is entered in those cases whether they are or are not obligated to pay any judgment up to the extent of the insurance provided in the policy.

Now, briefly it is our position in this case—I am afraid I said "briefly" about five times now — but briefly it is our position that the fact of the Oregon [15] driver's license, there is some confusion about it. I believe that the evidence will indicate that Mr. McKinzie was entitled to an Oregon driver's license at that time, although he had not actually obtained one. Also the evidence will show that he had a Cali-

fornia driver's license at that time and that actually he was a resident of California.

The muffler charge, that would be just a question for you to determine whether that's such a material thing that would influence the company one way or the other in entering into an insurance contract. We don't believe that Mr. McKinzie was guilty of any fraudulent conduct at the time that he took out the insurance and that, of course, you will have to determine from the facts which are presented to you.

We further believe that the acts and the conduct of the insurance company extending from the month of June up until almost to October will indicate the intention by them to abide by their contract and that they are barred or, as the lawyers describe it, estopped from commencing these proceedings or for maintaining them.

We believe, particularly, that there was unreasonable delay after they had knowledge or after they should have known of the circumstances involving the driver's record. We believe that the evidence will indicate that they are obligated to defend their insured, Mr. McKinzie, if a judgment [16] is entered in those other cases.

We further believe they are obligated to pay the amount of the insurance that they contracted to pay. Thank you.

The Court: Plaintiff's first witness.

Mr. Bosch: Your Honor, before I call a witness I would like to have marked and offered in evidence some exhibits which might help as we go along.

The Court: The bailiff is attending another jury. So you may hand them to the clerk.

Mr. Bosch: Mark this Plaintiff's 1.

(At this point a Mayflower Applicant's Statement was marked for identification as Plaintiff's Exhibit 1.)

Mr. Bosch: Your Honor, there are certain of the exhibits which are part of the file, a deposition of the defendant, McKinzie, the original of it, and also the answer which originally was filed by the defendants Gilmont.

The Court: The original answer in this case?

Mr. Bosch: Yes, your Honor.

Mr. Kennedy: What are you offering, Mr. Bosch?

Mr. Bosch: Right now I am not offering anything. But I want to offer the answer of the defendants Gilmont.

Mr. Kennedy: Very well.

The Court: That was the answer in the state court or [17] here?

Mr. Bosch: Here, your Honor. There was an amended and supplemental answer, but I am interested in the original answer. That's Plaintiff's 3.

(At this point a true copy of insurance policy was marked for identification as Plaintiff's Exhibit 3.)

Mr. Bosch: Plaintiff's 7.

(At this point a State of Oregon Certificate was marked for identification as Plaintiff's Exhibit 7.)

The Court: How many exhibits do we have now?

Mr. Bosch: I beg your pardon, your Honor?

The Court: I was asking the clerk how many exhibits we have. You are offering the deposition of Arthur Allen McKinzie?

Mr. Bosch: Yes, your Honor.

The Court: As your exhibit?

Mr. Bosch: As defendants'.

The Court: You are offering it in your case in chief, are you not?

Mr. Bosch: Yes, we are.

The Court: It will have to be a plaintiff's exhibit. It isn't an exhibit. It's just identified and made a part of the record. The deposition of defendant McKinzie will be [18] marked for identification as Plaintiff's 20.

(At this point deposition of Defendant McKinzie was marked for identification as Plaintiff's Exhibit 20.)

The Court: It will be published and made a part of plaintiff's case in chief.

Mr. Kennedy: Is that being admitted, your Honor?

The Court: It isn't technically admitted. It's just made a part of the record. You may either read it into the evidence or it can be stipulated it would go—no. I think it should be read into the record.

Mr. Bosch: Now, at this time, your Honor, I would like to offer into evidence Plaintiff's Exhibit No. 1 which is the original copy of the application.

The Court: Any objection?

Mr. Kennedy: No objection.

The Court: It will be received.

(The Mayflower Applicant's Statement, having been previously marked for identification, was received in evidence as Plaintiff's Exhibit 1.)

Mr. Bosch: I would likewise offer into evidence the true copy of the policy of insurance which is Plaintiff's Exhibit No. 3.

The Court: Any objection? [19]

Mr. Kennedy: No objection.

The Court: It will be received.

(The true copy of insurance policy, having been previously marked for identification, was received in evidence as Plaintiff's Exhibit 3.)

Mr. Bosch: I would also like to offer into evidence the answer of the defendants Gilmont.

The Court: Do you have a number reserved for that?

Mr. Bosch: Well, I originally had No. 20 reserved, your Honor, but that was reassigned to Defendants' 1.

The Court: The answer will be marked Plaintiff's Exhibit 21.

(At this point a document entitled Answer was marked for identification as Plaintiff's Exhibit 21.)

Mr. Bosch: I thereafter offer what has been marked as Plaintiff's Exhibit 21, the original answer of the defendants Gilmont.

The Court: Any objection?

Mr. Kennedy: I object to that, your Honor, on the grounds there has been an amended and supplemental answer filed.

The Court: Well, I assume it's being offered as an admission. [20]

Mr. Bosch: It is, your Honor.

Th Court: Well, let's withhold the offer of that until it's identified.

Mr. Bosch: I beg your pardon?

The Court: Let's withhold the offer or the ruling on it until it's identified by the party.

Mr. Bosch: All right, your Honor.

The Court: I assume you are going to call him. We will have to wait and see whether there is an adverse admission.

We have another deposition of Arthur Allen McKinzie in the file. Is that a copy?

Mr. Bosch: There was only one taken, your Honor. Perhaps you have got mine, the copy that I had in my file. It's been marked. That is not the one that I would prefer. I would prefer to have my own and mark the Court's copy as the exhibit.

The Court: Let the record show that there appears in the original file an envelope being sealed, endorsed "Deposition of Arthur Allen McKinzie Taken in behalf of Plaintiff March 6, 1958," before Niel C. Doane, Notary Public for Oregon. It bears the stamp of the Clerk of this Court under the date of April 1, 1958. The Clerk is directed to break the seal and remove the contents thereof and mark the contents Plaintiff's Exhibit for identification 20.

(At this point Deposition of Arthur Allen [21] McKinzie taken March 6, 1958, was marked for identification as Plaintiff's Exhibit 20.)

The Court: Is there any objection to the publication of this deposition?

Mr. Kennedy: Well, your Honor, Mr. McKinzie is not available here in the courtroom. He is in the Veterans Hospital. I assume that counsel, if he wants his testimony, could call him.

Mr. Bosch: If the Court please, we have not offered that in evidence yet. I ask it only be marked. I assume that's what the question was referring to.

Mr. Kennedy: There is no objection, then.

The Court: It will be published and made a record of the case.

Mr. Bosch: Plaintiff will call Mr. Carlson.

The Court: I think I had better interrupt here. We have a jury verdict waiting.

(At this point the trial of the present case was interrupted while another matter was heard.)

The Court: Plaintiff's first witness.

Mr. Bosch: Your Honor, I think it might be of help to the jury in considering what is going to follow here immediately if I would be permitted to read the application which we have offered. [22]

The Court: It's in evidence and you may read it in the record. I would like the record to show that any written exhibit introduced into evidence may be read by any party at any time during the course of the trial, with the one exception that on its initial reading it should be read in its entirety. Thereafter any party may refer to any portion of it.

Mr. Bosch: Yes, sir.

Ladies and Gentlemen: This is what has been

marked and which has been entered into evidence and will be referred to hereafter as the Plaintiff's Exhibit No. 1 and quite aptly so. This is what we start our case about.

This is the application that I referred to earlier that Mr. McKinzie signed on the 16th day of April in the company's southeast district office here in the City of Portland. According to the Court's ruling this entire application has to be read to you at this time. And I will start and please bear with me.

It starts off at the top, printed, Mayflower Insurance Exchange, Seattle, Washington. Declarations. Following that there are five boxes which have Type, State, District, Agent, and Territory. And then under each one of those are numbers 1, 2, 1, 1, and 1, respectively. Up at the top also it refers to this as the original. Below that it says Home office use only. [23]

Below that are some numbers which are CC 102-706. Then it refers to a policy number: 174380. That is the number which is assigned to this policy.

Then it goes on with DPC 40575109 AC 01 and it is crossed through. I don't know whether it's a zero, a 6, or a 2.

Then we come down to the more important parts. It says Name of Applicant: Arthur A. McKinzie. The next line is his residence and it is 4619 S. W. View Point Terrace, Portland, Oregon. Occupation: Welder. Policy period from 4-16-57 to 10-16-57—that is a six-month period—at 12:01 A.M., standard time at the address of the application stated herein.

In small type it says up above Except with re-

spect to bailment lease, conditional sale, mortgage or other encumbrance, the applicant is the sole owner of the automobile except as herein stated.

It proceeds to limits of liability which is printed, and A Bodily injury, which is printed and pencilled is completed the figure $10,000 each person, $20,000, each accident. That's what we refer to as a 10-20 policy.

Property damage is written in at $5,000 each accident.

Following that information is a column headed Premium deposit. The one next to that is Initial fee. And [24] a column entitled Billing codes. And in those respective columns are the figures $30.24, $1.00, and a figure 1.

Underneath that is C & D—Fire and Theft, which is not filled in. Actual cash value not filled in. E—Comprehensive car damage (including Fire & Theft) Actual cash value. Premium deposit, $5.40. Initial fee, 50 cents. And a billing code number assigned to this as 2.

Following that is F. Collision or Upset. Actual cash value less 50 Deductible. The premium deposit there is $22.50. The initial fee, 50 cents. And again, the billing code number assigned, 2.

Following that is F-2. Towing and road service. That is blank.

G—Medical expense. And that is entirely blank. Other coverage. Entirely blank. Then all of these things that I have read are brought down and compiled. Accidental Death and Disability? (Use line above to indicate coverage), and all of these things

are totaled down here for a premium deposit totaling $58.14 plus the initial fee of $2.00. And under the column billing code the total premium would be $60.14.

Then in the box to the right there is a description of the vehicle which reads as follows: Year: 1951. Cylinders: 8. Make: Cad. I assume that is for a Cadillac. The model is blank. The body type is Cpe. And I assume that's coupe. [25] Motor number is filled in as 516262287. Serial number is blank. The purchase date shows 4-16-57, the same day. New or used: And it is shown as used. And the purchase price is $1390.00.

That brings us down to all the information relating to the amount of coverage, the description of the vehicle, and who we are talking about, where he lives and what his occupation is. How much it is going to cost him for the policy and what he expects to get for it——

Mr. Kennedy: If the Court please, I think counsel should just read the document rather than try to interpret it.

The Court: Yes. Just read the wording.

Mr. Bosch: Then it goes on, Any loss under Coverages C and D, E and F-1 is payable to the named insured and such persons as are named hereafter, if any, as their interest may appear: City Finance Co., 534 S.E. Morrison, Portland, Oregon.

And underneath that is a line. Underneath that line is written or printed, rather, Mortgagee name and address.

Then halfway down it proceeds to what is called

Applicants Statement in full capital letters in red ink. And it goes this way: 1. Have you or any driver of this car—(a) any physical impairment? The answer written in in ink is No. (b) had auto insurance cancelled or refused? No. [26] Had license revoked or suspended? No. Received any driving charges, citations or fines (not parking) in past 3 years? No. Been involved in any auto accident as a driver in past 3 years? No.

Question 2 is Name of previous insurer, and the answer to that is None. Question 3 is Name and address of employer and there is filled in the answer Page & Page Truck Equipment Co., Portland.

No. 4 is the vehicle is or is not—there is a choice, —and underlined is is not. So it reads The vehicle is not used in the duties of my present occupation.

5. The following are the only other drivers of this vehicle living in the household, and underneath that is None.

No. 6 asks How long have you known the agent, and there is filled in the word New.

7 is Did agent inspect vehicle? And there is filled in the word Yes.

8. Any unrepaired damage noted? No. I am single-or-married choice, and underlined is married.

10. My age is 40 and birthdate is left blank.

No. 11 is How many cars in the household, and the answer is One.

No. 12. If vehicle not garaged at above address, state where, and that is left blank. [27]

13 is How long living at present address, which is followed by 2 years. Then it goes on, less than a year previous address, and that's blank.

Then at the foot is this language which is printed:

"In consideration of the benefits to be derived therefrom the subscriber agrees with Mayflower Insurance Exchange and other subscribers thereto through Mayflower Underwriters, Inc., their attorney-in-fact, to exchange with all other subscribers policies of insurance or reinsurance in such form as may be specified by said attorney-in-fact and approved by the Board of Governors or its Executive Committee for any loss insured against, and subscriber appoints Mayflower Underwriters, Inc. to be attorney-in-fact for subscriber, with full power of substitution, granting it power in subscriber's name, place and stead to do all things which subscriber might or could do, severally or jointly, with reference to all policies issued, including cancellation, collection and receipt of monies due to the Exchange, disbursement of loss and expense payments to effect reinsurance, and perform all other acts incidental to the management of the Exchange and the business of inter-insurance; the maximum amount to be paid to Mayflower Underwriters, Inc. as compensation for its services shall be the membership fees and twenty-five per cent of all premiums. Said attorney is empowered to accept service of process on behalf of the [28] Exchange and to authorize insurance commissioner of any state to receive service of process in actions against

the Exchange upon contracts of inter-insurance. Reserves and general surplus remaining after payment of losses and expenses out of the remaining portion of premium received shall be invested and reinvested by the attorney-in-fact, subject to the approval as to such investments by the Board of Governors or its Executive Committee. Expenses payable from said remaining deposits and continuing premiums shall include all taxes, license fees, attorney's fees, adjustment expenses and charges, expenses of members' and Governors' meetings, agents' commissions, and such other specified fees, dues and expenses as may be authorized by the Board of Governors. All other expenses incurred in the conduct of the busines and such of the above expenses as may be agreed upon between Mayflower Underwriters, Inc. and the Board of Governors or its Executive Committee, shall be borne by Mayflower Underwriters, Inc. The subscriber agrees to be liable severally for a contingent liability which shall not be more than a sum equal to one premium deposit, which contingent assessment liability shall apply only to actual losses and expenses incurred during the time that the policy of insurance shall have been in force.

"This agreement can be signed upon any number of counterparts with the same effect as though the signatures of all subscribers were upon the same instrument, and shall [29] be binding upon the parties severally and ratably as provided in the policies issued. The word 'subscriber' as used herein shall mean members of the Exchange, the subscriber

hereto, and all other subscribers to this or any other like agreement."

Then in red ink follows: "I declare the facts within the applicants statement to be true and request the Exchange to issue the insurance in reliance thereon. I understand the insurance will in no event become effective prior to the time and date actually applied for, as indicated below."

Then follows Applied for 6:00 P.M. and 4th month, 16th day of 1957. And on the top of the line under which the signature of applicant is the signature A. A. McKinzie. And at the foot in a stamp there is April 22, 1957.

On the back of this exhibit, Plaintiff's Exhibit No. 1, is entitled Agent's Statement and it says All questions on reverse side must be answered by the Applicant in full. Omissions will result in delay or declination of application. 1. The racial descent of the Applicant is, and it's filled in White. Does he speak English? Yes. 2. Source of application is blank. 3. Any member of the family have current Mayflower policy? It is written No. Then the name is blank and policy number is blank. 4. If rural address or general delivery, describe how to locate address. And that's blank. If truck, what is specific use? That's blank. [30] 6. Describe filings required, if any, and that's blank. 7. If Applicant answered Yes to any part of Section I or Section 8, explain below. Remarks: And that's blank. Then follows this: "I find the above statements to be correct to the best of my knowledge and I recommend this

subscriber." And it is signed George Bucholz, Agent.

Then follows what are called the District Agent's Report. Are all details in App. and Agent's Report complete? Yes. What is missing? And there is a check mark. When will it be sent in? And there is another check mark. Remarks are blank. State number is filled in as 2. The District number is 1. Agent's number is 1. The date is 4-17-57. Then appears this: "I have examined this application and recommend its acceptance," and the box is checked.

There is another statement that says "I have formally declined this application," and the box is blank.

Then again follows the signature of George Bucholz, and underneath that, District Agent's Signature.

Now, the prime purpose for reading all this or certain portions of it is not particularly relevant, but the part I think is relevant——

Mr. Kennedy: If the Court please, is counsel testifying? He is arguing the case.

Mr. Bosch: Now that I have satisfied the rule of the Court I would like to reiterate again the small portion called [31] the Applicants Statement.

The Court: You may.

Mr. Bosch: I will draw your attention once again, it says Have you or any driver of this car any physical impairment? No. Had auto insurance cancelled or refused? No. License revoked or suspended? No. Received any driving charges, citations or fines in past 3 years? No. Been involved in

any auto accident as a driver in past 3 years? No. Name of previous insurer? None.

Now, at this time, if it please the Court, I would like to read a certain portion of the defendant McKinzie's deposition for the purpose of showing that the statements which I have just read to the jury are not correctly represented.

The Court: Well, the only thing that I am concerned with now is that we don't take it out of context. I think that is pretty hard. How long is this deposition?

Mr. Bosch: I might say, your Honor, what I am particularly interested in now are the admissions against interest as they compare to the applicant's statement.

The Court: Well, from your copy can you give me page numbers?

Mr. Bosch: Primarily to make sense out of it to identify the deponent and for the same reason carry on through Page 2.

The Court: Well, I don't know what counsel's desire [32] would be about it. Does any counsel for the defendant have any objection to reading the answers while Mr. Bosch reads the questions?

Mr. Kennedy: Your Honor, Mr. McKinzie, I understand, is present in the City of Portland in the Veterans Hospital. And if he is going to be used as a witness I think he ought to be called. If the Court desires—if the Court considers it proper for this deposition to be read I believe it should be read in its entirety so it will not be taken out of context.

The Court: Well, I think this: I think this is properly a matter of rebuttal.

Mr. Bosch: Beg your pardon?

The Court: I think this is properly a matter of rebuttal.

Mr. Bosch: Well, your Honor, my purpose of offering it into evidence at this time is to show that the statements made by the applicant defendant, McKinzie, were not true. I expect——

The Court: Well, supposing he takes the stand and testifies the same way? You could only use it by way of impeachment.

Mr. Bosch: Well, I think I offered it, your Honor, on the ground of admissions against interest.

The Court: Well, you're premature on it.

Mr. Bosch: Beg your pardon?

The Court: You are premature. What is the rule providing [33] for use of discovery depositions? If the witness is available do you not have to call him if he is within the jurisdiction of the Court?

Mr. Bosch: Your Honor, I submit as authority for the admission of this deposition at this time two Ninth Circuit Court cases. I take that back. One Ninth Circuit Court case. The case of Autrey Brothers, Inc. vs. Chichester, which is found in 240 Fed (2d), 498. Just shortly quoting from that, the Court said it was immaterial whether or not the witness was able to testify or had testified in the action in which he was a party. Here we are offering the pertinent portions of a party's deposition, not a witness' deposition.

The Court: There is no doubt but what any dec-

laration against interest may be used against any party at any time. There is no doubt about that. Is that what you claim for this?

Mr. Bosch: Yes, your Honor.

The Court: Very well.

Mr. Kennedy: Your Honor, to simplify matters, I will withdraw our objection. I believe the deposition should be read in its entirety, though, because it should not be taken out of context by skipping from questions to answers.

The Court: Well, I can determine whether or not it is taken out of context. He is only offering what he claims to be admissions against interest and not offering the entire [34] testimony of the witness.

So, now, whether or not any part that he selects to read is taken out of context I will have to determine that when it is selected.

Now, it is a matter of getting someone to read the answers.

Mr. Bosch: May I suggest, perhaps, Mr. Vosburg could take the part of the deponent and borrow the original?

The Court: Very well.

Mr. Bosch: Or the Court's copy. If the Court please, I appreciate there are certain questions at the beginning that are not admissions against interest.

The Court: I understand. But I think it would be well to identify him.

Mr. Bosch: If I could more or less——

Mr. Kennedy: Why don't you read the whole deposition?

Mr. Bosch: On Page 3, Mr. Vosburg.

(At this point Mr. Vosburg took the witness stand to read the answers as given by the deponent in the deposition and Mr. Bosch in the present case presented the questions asked in the deposition.)

Mr. Bosch: This starts out as direct examination and I am asking the questions of a man named Mr. McKinzie who Mr. Vosburg is taking the part of. I start out by saying: [35]

DEPOSITION OF ART ALLEN McKINZIE

"Your name is Art Allen McKinzie?

A. Correct.

Q. Are you also known sometimes as Arthur A.?

A. Never.

Q. Do you ever sign as Arthur A.?

A. Never.

Q. Ever sign as A. A. McKinzie?

A. Oh, yes.

Q. And Art A. McKinzie?

A. Yes. Never as Arthur.

Q. So your name is Art, it is not a short for Arthur? A. Uh-huh.

Q. How old are you, Mr. McKinzie?

A. Forty-one.

Q. Where were you born?

A. Portland, Oregon.

Q. How long have you lived in Portland?

(Deposition of Art Allen McKinzie.)

A. Oh, I left here when I was about nine years old.

I was actually raised in Los Angeles."

Mr. Bosch: Your Honor, trying to keep myself within the limits of the Court's ruling, there are, I appreciate—if I take it out of context—I have got to make some explanation of the context as I come up to these questions because I have skipped a considerable amount. But to make some sense I would like to make some comment, if I may. You might—— [36]

Mr. Kennedy: I object to any comments being made, your Honor. And I——

The Court: Well, I don't know what his comments are.

Mr. Kennedy: Well——

The Court: I might object to your comments.

Mr. Bosch: I direct your attention, Mr. Vosburg, to Page 8. And I am referring to a question halfway down the middle of the page, and I am asking the deponent, Mr. McKinzie, to give us the exact words that he used as he came in to make his application. And my question——

The Court: Just read the question.

Mr. Bosch: My question is this:

"Q. Now, can you tell us, and use as best you can the exact words, what you told him when you first came in.

A. Sam had already called on the telephone, he was expecting me, so he made out the insurance papers.

(Deposition of Art Allen McKinzie.)

Q. Did you tell him who you were, give him your name? A. Yes.

Q. And then tell him that you wanted insurance on this car? A. That's right."

Mr. Bosch: Now referring to Page 9, Mr. Vosburg—and this, your Honor, is after the deponent had in his hand a copy of the application. I had handed him a copy of the [37] application and we were questioning him as it goes on:

"I am going to hand you what Mr. Doane has marked as Plaintiff's Exhibit No. 1.

A. He filled this out himself.

Q. Now, let me ask you first if that is your signature down in the right-hand corner.

A. That is my signature, I didn't notice that 'Arthur'. He just filled in 'Arthur' because he figured Art was short for Arthur.

A lot of people take it that way, probably the same as you did and other people.

Q. On that piece of paper that you have there which has been marked as Plaintiff's Exhibit 1, is there any handwriting on that exhibit which is yours other than the signature which you have identified? A. No.

Q. In other words, all but the signature on that application——

A. That is the only thing that was made by me is my signature.

Q. Let me finish my question. All of the writing that is on that application was made by this agent for Mayflower except for your signature?

(Deposition of Art Allen McKinzie.)

A. That's right.

Q. Is that correct? [38] A. That is correct.

Q. Now, when you came in there did he ask you what your name was? A. Yes, uh-huh.

Q. And your address? A. Yes.

Q. What kind of a car it was? A. Uh-huh.

Q. And how much coverage you wanted?

A. Well, he had already known what the car was and Sam had already evidently told him.

Q. Is the information on that application, is it correct as to the kind of a car you were insuring?

A. That's right.

Q. And your address? A. That's right.

Q. And there is a mistake on your name?

A. That's right. It is 'Arthur A.' up here, it should be 'Art A.'

Q. All right.

A. But that is the only signature on there that is mine, any other writing on there isn't mine.

Q. Now, is the date approximately correct that is on it, as far as you remember?

A. 6/19—I believe so. [39]

Q. And was the time which is down in the lower left-hand corner, 6:00 p.m., is that correct?

A. That's right, I said it was about 6:00.

Q. Now, I want you to look at that and tell me if there is anything on there that is not correct.

A. My name at the top for one.

Q. Anything else?

Mr. Kennedy: Give him an opportunity to examine the whole document.

(Deposition of Art Allen McKinzie.)

Mr. Bosch: All right.

The Witness: There is only one on there, it says, 'License suspended or revoked.' My license was never actually revoked or suspended because I never had a license here at the time you are referring to. That was a 'No muffler' citation. I had never applied for an Oregon driver's license up to that time then. I was driving with a California driver's license. I just came from California. So technically I never had a license to be revoked or suspended.

Q. All right, let me ask you this: At the time that this application was signed, did the agent or the person that took your application, did he give you a copy of it? A. Yes, I believe he did.

Q. Do you still have that copy? [40]

A. I think it is at home, hu-huh.

Q. Do you remember how much money that you paid to the agent at the time?

A. I can't recall right offhand. It should be on here shouldn't it?

Q. If I told you it was $20, would that be about right? A. I don't recall now.

Q. Did you pay some money?

A. Yes, uh-huh.

Q. Did he give you a receipt?

A. I was supposed to pay so much a month.

Q. Did he give you a receipt for the amount of money that you did pay? A. Yes.

Q. Now, directing your attention on this Plaintiff's Exhibit No. 1 to the portion about the middle

(Deposition of Art Allen McKinzie.)

of the page which is entitled, 'Applicant's Statement,' and under that item (1), would you read out loud the questions under that item and the answers that you gave?

Mr. Kennedy: I object to it, the document speaks for itself.

Mr. Bosch: All right.

Q. At the time this application was taken over in Mayflower's office, had you had a license revoked or suspended? [41]

A. Technically yes and technically no.

Q. Well, give us technically yes why.

A. Well, that is kind of a silly question.

Mr. Kennedy: Let him answer the question.

The Witness: Because actually I didn't feel that I had any right to have my license revoked or suspended on a lousy charge for no muffler on a truck and I had no Oregon driver's license at the time to be revoked or suspended.

Q. Had you ever had an Oregon driver's license?

A. Years before.

Q. About when did you take it out?

A. It was—I don't know. It ran out in '50 or '51.

Q. Where did it run out?

A. Because I was in California, I didn't need it here.

That is a good question.

Q. You think that you first got your Oregon driver's license in what year?

A. '49. Well, let's see. No, the first time I ever

(Deposition of Art Allen McKinzie.)

had an Oregon driver's license was in '46 or '47, pardon me; I will say it was '47 the first license I ever had in Oregon.

Q. Had you ever had a driver's license before that?

A. Oh, yes, in California, but never here.

Q. So, the first Oregon driver's license you had was [42] in 1947? A. The first one.

Q. Did that ever expire?

A. Yes, and I got one in '49, I think was the next one.

Q. Why did the one in '47 expire?

A. For the one thing I was out of this country again.

Q. In other words, you didn't——

A. I went to Guam for a year; that is in the Marianas, for a year, and after that I came back to California for a while and then I came back up here and I was married in '49 in Dallas."

Mr. Bosch: Now, at this stage, your Honor, I handed to the witness what we referred to in that deposition as Exhibit No. 2 and it was an abstract of his driving record.

"Q. Mr. McKinzie, I am going to hand you what has been marked for identification as Plaintiff's Deposition Exhibit No. 2.

I want you to look at that.

A. You are referring about another accident, I imagine.

Q. No, I just want to get the driving record straightened out.

(Deposition of Art Allen McKinzie.)

A. Now, this was——

Mr. Kennedy: Just a minute, let him ask you the question. [43]

Q. (By Mr. Bosch): Have you read Exhibit 2?

A. I am reading it now.

Q. Let me know when you finish reading.

A. That accident in '47——

Q. Just a minute, have you finished reading it?

A. Yes.

Q. The whole thing?

A. No, I haven't read the whole thing.

Q. You read the whole thing and let me know when you are finished.

A. I never knew there was one suspension.

Q. Are you all finished reading it?

A. Yes, uh-huh, but this is not correct.

Q. All right.

Now, may I see it a moment. This report reflects that you were issued a license on January 4, 1951.

Mr. Kennedy: I object to that.

Mr. Bosch: Is that correct?

Mr. Kennedy: Just a moment, I object to the question on the grounds that he is being asked questions or impeached from a document that has not been properly identified as a true and correct copy of anything and he has also stated that it was not a correct copy.

Mr. Bosch: We will find out whether it is correct [44] or not.

(Deposition of Art Allen McKinzie.)

Q. Do you recall whether you got an Oregon driver's license on or about January 4, 1951?

A. No, I didn't.

Q. Were you in Oregon at that time?

A. In 1951 I was in Los Angeles.

Q. Well, when did you return to Oregon?

A. I left here in '52. I came up here and worked on the Detroit Dam job and after the dam job I left and went back to L. A.

Q. Well, did you have an Oregon driver's license in 1947?

A. No, I didn't have an Oregon driver's license in 1947. I had just come up here from California and had a California driver's license in 1947. After that accident I was issued a license.

Q. After what accident?

A. After that first little accident there where a guy hit me smack in the middle.

Q. Which one, what date?

A. 1947; that part there is correct. That was my cousin's car. I had a California driver's license at the time and it was never suspended.

Q. Your California license wasn't?

A. No. After that I was issued an Oregon driver's [45] license and a chauffeur's license because I was driving for Armour Company.

Q. Do you remember what year that was?

A. 1947.

Q. And that was after this accident?

A. After the accident, and I was never notified that I was ever suspended in 1947.

(Deposition of Art Allen McKinzie.)

Q. Well, le'ts try it this way: You have read this——

A. Part of it I read, yes, I have read it.

Q. ——this Exhibit 2? A. That's right.

Q. Will you tell us what part of this Exhibit 2 is incorrect?

Mr. Kennedy: Just a moment, I am going to object to the introduction of that exhibit until it is properly identified, and I object to any further questions on the exhibit until it has been properly introduced.

Q. (By Mr. Bosch): Do you understand what that exhibit is? A. Yes.

Q. Will you tell us what part of it is incorrect?

A. 1947, June the 4th, 1947, I was never suspended. I was driving for Armour & Company at that time.

Q. Is there any other part of it that is incorrect?

Mr. Kennedy: I would like the record to show a [46] continuing objection to any question pertaining to that particular document being marked as Plaintiff's Exhibit 2.

The Witness: Yes, the judgment evidently was awarded against me.

Q. (By Mr. Bosch): Was that part correct?

A. But, I did have insurance through Heider and Heider has never paid it.

Q. As far as that document is concerned, is it incorrect in any other respect than the one that you previously stated?

(Deposition of Art Allen McKinzie.)

A. Traffic offense—isn't that silly. Yes, that is correct except that 1947. But I had no driver's license here when I had that accident.

Q. Which accident?

A. I mean this, 'No muffler' citation.

Q. You had no license?

A. I had no Oregon driver's license, I had a California driver's license. I just came up from California.

Q. You are referring to this?

A. 'No muffler.'

Q. That was February 14th, 1946, is that correct? A. That is correct.

Q. At that time you had no Oregon driver's license?

A. That is correct, I had just come up, I wasn't even [47] a resident of Oregon yet. I hadn't decided whether we would stay or not.

Q. But prior to that time and according to this, and correct me if I am not stating it right, you did have your driver's license, your Oregon driver's license suspended for the nonpayment of that judgment?

A. I was never notified of that either because I wasn't here. I was in California. I was never notified of that.

Mr. Kennedy: So you don't know?

The Witness: So I don't know. I never received anything saying that I was suspended.

Q. (By Mr. Bosch): So you don't know whether this is correct or not?

(Deposition of Art Allen McKinzie.)

A. I can't say it is, because I never received any notice at all that I was suspended at that time.

Q. Now, do you have an Oregon driver's license now? A. No.

Q. Have you ever made application for one?

A. I did.

Q. When? A. After that.

Q. When?

A. After that 'no muffler' charge.

Q. What was the effect of that?

A. Suspension for a year. [48]

Q. When did you make application, about when?

A. February, after this 'no muffler' charge.

Q. Of 1956? A. 1956, correct.

Q. And they said they would——

A. The State suspended my license for a year and I thought it was a real bum rap.

Q. Do I understand you correctly now, after your muffler citation sometime in February of 1956 you made an application to the State of Oregon for a driver's license? A. That is correct.

Q. And they then advised you your driving permit or license in the State of Oregon will be suspended? A. For one year.

Q. For one year, from approximately February 1956 to February 1957? A. That is correct.

Q. Now, did you ever get a driver's license from the State of Oregon? A. Not after that, no.

Q. Did you get one in approximately February of 1957?

(Deposition of Art Allen McKinzie.)

A. Close to it. I got a permit, but I was never issued a license.

Q. What kind of a permit?

A. Well, it was just a permit—it wasn't a [49] permit—it was a—that I applied for my license.

Q. I see. But you never did get an Oregon driver's license?

A. I had never received it in the mail, no.

Q. Well, would it be correct to say that you still don't have an Oregon driver's license?

A. That's right.

Q. And you haven't had one since when?

A. '51 or something like that. I think it run out about '51, the last one."

Mr. Bosch: Now, this question at the foot of the page: "But in the year prior to the time that"——

Mr. Kennedy: Just a moment! Are you skipping?

Mr. Bosch: Yes.

Mr. Kennedy: Where are you skipping to?

Mr. Bosch: The last question at the foot of Page 21. I will read the whole thing. Do you want me to read it?

Mr. Kennedy: Yes.

Mr. Bosch: Is that all right, your Honor?

"Q. Now, going back to this application which was taken April 16th, 1957——

A. I was eligible for a license then.

Q. Have you received a license?

A. No, I never even applied for one. For one thing, I had been to Los Angeles working and I

(Deposition of Art Allen McKinzie.)

had been clear [50] to Salt Lake City driving and I was using my California driver's license; it was still good.

Q. At the time you made the application on April 16th, when you made your application to Mayflower, you still had your California driver's license?

A. Yes, I still had my California driver's license.

Q. And that was still in full force and effect?

A. Yes, that's right.

Q. But in the year prior to the time that you made this application to Mayflower for this insurance, and that was on April 16th, 1957, you did have your Oregon driver's license suspended, didn't you? A. In February——

Q. Of '56?

A. I had no Oregon driver's license to be suspended actually. I never received one.

Q. You made application in February of 1956?

A. That is correct.

Q. They advised you they would suspend the issuance of a license for one year?

A. For one year for the 'no muffler' charge.

Q. All right. But at the time you had the 'no muffler' charge, you didn't have a driver's license, Oregon driver's license?

A. No, it was a California one. I didn't even have a [51] residence here. I was staying with my mother-in-law.

Q. Well, would it be correct to say that you had

(Deposition of Art Allen McKinzie.)

had your license suspended prior to the time that you made this application?

A. A year before, yes, but I was eligible for a license then.

Q. I appreciate that, but would it be correct to say that you had——

A. I hadn't applied, if that is what you imply, I hadn't applied, when I bought this car, if that is what you mean.

Q. But, you had applied for one in February of '56? A. That is correct.

Q. And they advised you that it would be suspended for a year?

A. That I would be eligible next February, '57.

Q. So there was a suspension of a license, is that correct?

A. No license to suspend. Actually I never received a license.

Q. Now, were there any driving charge, citations or fines in the three years prior to the time you made this application? A. Here in Oregon?

Q. Any place. [52]

A. Well, I might have had some tickets in Los Angeles, if that is what you mean.

Q. What would they be for?

A. For motorcycles. I used to drag race once in a while.

Q. What would be the citation? Would it be for overtime parking? A. No, drag racing.

Q. For speeding?

(Deposition of Art Allen McKinzie.)

A. Drag racing. Just drag it from a signal, a motorcycle.

Q. Would that be within three years prior to the time you made application for this insurance?

A. It could be.

Q. Well, let's put it down to states.

A. A motorcycle is a little different than an automobile.

Q. I appreciate that. In the State of Oregon in the three years prior——

A. No tickets at all.

Q. What about this 'no muffler' charge?

A. Well, that is the only one.

Q. Other than the 'no muffler'?

A. There was no fine even connected with that. The fact, the judge was mad the State had suspended my license or, hadn't suspended my license, but the judge was real [53] mad, he figured it was up to him to do the suspension instead of the State. So he wouldn't even fine me.

Q. All right. But there was a traffic violation in Oregon? A. That is the only one.

Q. Within three years, and that was the 'no muffler'? A. Yes.

Q. And that was down in Corvallis?

A. That's right.

Q. Other than that, there was none within three years? A. That's right.

Q. How about the State of California, within three years of April 16, 1957?

A. I told you the drag racing.

(Deposition of Art Allen McKinzie.)

Q. Any others? A. That is all.

Q. Will you tell us again what drag racing means?

A. Motorcycles, a whole line of motorcycles dragging out.

Q. You mean see who could get out first?

A. That's right. About six of us, and each one of us got a ticket.

Q. Do you know where that occurred?

A. City of Bell.

Q. And that only happened once? [54]

A. That is correct.

Q. Well, when you made this application, why didn't you tell the man that took it about that one?

A. They didn't ask me if I ever had any tickets for any speeding or anything.

Q. Did you understand what charges, citations meant?

Let me ask you this: Were you fined as a result of this? A. Yes, I was fined.

Q. Do you understand what a fine is?

A. Sure I understand.

Q. Well, your answer on this application there indicates you had no fine."

Mr. Kennedy: And I objected at that point on the grounds it was argumentative.

The Court: Yes, it is.

Mr. Bosch: "Do I understand you now, in the three years prior to the time that you made this application on April 16th, 1957, that you had only had—— A. One ticket.

(Deposition of Art Allen McKinzie.)

Q. You had one ticket and that was where?

A. Actually one ticket.

Q. Where was that?

A. I was never fined for the 'no muffler' charge.

Q. All right. Where was that? [55]

A. That was the City of Bell, California.

Q. Did you pay a fine there? A. I did.

Q. All right. On the 'no muffler' charge did you plead guilty to it?

A. Oh, yes, naturally I was guilty.

Q. But you didn't pay a fine?

A. But I didn't even have to appear, my brother-in-law appeared because it was his car. All he had to do was show that it was repaired.

Q. Are you sure now that those are the only two violations, citations or fines that you had any place, California, Oregon, or any other state?

A. That is correct.

Q. Then referring your attention back to Plaintiff's Exhibit 1 and under——

A. You are asking me for my life's history.

Q. ——and under the portion entitled 'Applicant's Statement,' is the answer to question 1-D correct or incorrect?

A. 1-D. Citation—well, it wouldn't be correct, would it?

Mr. Kennedy: Are you talking about 1-D?

Mr. Bosch: 'D' as in dog.

The Witness: 'D' as in dog. [56]

Q. (By Mr. Bosch): Is the answer to 1-E correct?

(Deposition of Art Allen McKinzie.)

A. I want you to note that none of this is my handwriting on here.

Q. I appreciate that. A. '1' what?

Q. 1-E as in easy?

A. That is correct there other than—let's see—that would be correct.

Q. Your answer to 1-E is correct?

A. Right.

Q. Is the answer to 1-B as in boy, correct?

A. No, that wouldn't be correct, would it?

Q. I don't know.

A. Let's see, wait a minute. No, that is right.

Q. That is correct?

A. That is correct. I have never been refused insurance or—read out the whole statement, why don't you?

Q. Well, it says, 'Have you or any driver of this car had auto insurance cancelled or refused."

A. No.

Q. So that answer is correct?

A. That is correct.

Q. All right. Now, directing your attention to question 2, under the same applicant's statement——

A. Uh-huh. [57]

Q. 2, I didn't put that down. Is that correct?

A. No, because I don't recall the insurance companies that I have done business with.

Q. Well, do I understand you that——

A. I hadn't had any insurance for quite a while then.

Q. Do I understand you, then, that the answer

(Deposition of Art Allen McKinzie.)

to number 2 was given as, 'None,' because you didn't recall the names of the companies?

A. That's right, I don't carry all of this stuff around in my pockets.

Q. But you did have previous insurance?

A. Yes, I bought several different cars on time, naturally I was insured.

Q. Can you recall now the names of any companies? A. Can I recall what?

Q. Can you recall now the names of any companies? A. No, I can't.

Q. Were any of the companies—did you take any of the insurance in these companies out in Oregon? A. That's right.

Q. How many?

A. Through Otto Heider. He is insured in Oregon, the insurance company that I was through.

Q. Did you only do that once with Mr. Heider?

A. No, I had two different policies through him that [58] I know of.

Q. Were they taken out different times?

A. Yes, two different cars.

Q. But other than your insurance that was written with Mr. Heider, was there any other insurance taken out in the State of Oregon? A. No.

Q. How about the State of California?

A. Yes, when I had a motorcycle, but I don't recall the insurance company.

Q. Well, was there more than one?

A. More than one what?

Q. More than one company?

(Deposition of Art Allen McKinzie.)

A. No, just one company.

Q. It was always the same company with your motorcycle? A. That's right.

Q. Did you ever have an insurance policy on an automobile in California?

A. If I did it has been so many years ago that I don't recall the names. I bought several different cars and I had insurance for them all, not liability insurance, I had deductible, fifty dollars, twenty-five dollar deductible, whatever it was.

Q. Did you ever have any liability insurance at any time prior to the time you made this application with [59] Mayflower? A. Yes."

Mr. Bosch: Your Honor, I don't claim anything for the next page and a half or two pages. But if counsel wishes I will read it on through.

Mr. Kennedy: I think the whole deposition should be read.

The Court: It's not necessary to read the whole deposition. I will hear you if you are of the opinion that something has been taken out of context. This offer was purely for admissions against interest.

Mr. Kennedy: It's impossible to follow it that closely. It's difficult to tell whether it's out of context when all the testimony isn't read.

The Court: It seemed to me they are correct questions and answers, unless you can show me something. I don't see anything out of context.

Mr. Bosch: If counsel has no objection I would

(Deposition of Art Allen McKinzie.)

like to move over to Page 32 about the middle of the page:

"Q. Would it be correct to say that your answer to number 2 under your 'Applicant's statement' is not correct, is that right? A. That's right.

Q. It is not correct?

A. He wrote it in there himself, the agent did.

Q. Well, where did he get the information?

A. Probably from me, I don't have any insurance policies in my pocket.

Q. Did he get all of this information from you?

A. Evidently, I was the only one there."

Mr. Bosch: Now, I would like to move over to the middle of Page 33.

The Court: All right.

Mr. Bosch: "Q. After he took the application and your money, did he give you a receipt for the money? A. Oh, yes.

Q. And a copy of the application?

A. That's right.

Q. Sometime after that did you get the policy?

A. That's right.

Q. Do you still have the policy?

A. That is correct.

Q. You still have the application?

A. That is correct.

Q. Do you still have the receipt?

A. That is correct."

Mr. Bosch: Now, I would like to move over to the cross examination by Mr. Kennedy on Page 39.

(Deposition of Art Allen McKinzie.)

The Court: Now, you are still contending that this is an acknowledgment against interest? [61]

Mr. Bosch: Yes, your Honor. This will appear just above the middle of the page.

"Q. About 6:00 p.m. Did he ask you any of these questions on the applicant's statement or did he just fill them out? A. He asked me.

Q. He asked you some questions."

Mr. Bosch: These, incidentally, are questions put by Mr. Kennedy on cross examination.

"Q. He asked you some questions. Did he ask you all of the questions that are on this applicant's statement? A. I think he did, yes.

Q. He asked you every one of those questions?

A. That's right."

Page 41. This is still Mr. Kennedy interrogating. There appears up towards the top:

"Q. Did he ask you if your license had been suspended? A. Evidently he did.

Q. Do you remember that definitely or not, or can you remember?

A. I think he must have.

Q. You think he must have?

A. Uh-huh. He read all of the answers off there and I just said, no, no, no."

That's all I offer it for. [62]

The Court: You may step down, sir.

Members of the jury, take a ten-minute recess.

(Recess taken.)

Mr. Kennedy: I would like to read the cross

(Deposition of Art Allen McKinzie.)

examination to explain some of these previous answers.

The Court: All right. If you claim it is out of context you may.

Mr. Vosburg: Do you want me?

Mr. Kennedy: Please.

(At this point Mr. Vosburg took the witness stand to read the answers as given by the witness in the deposition while Mr. Kennedy presented the questions as were presented in the deposition.)

Mr. Bosch: Do I understand, your Honor, this is being read on the basis that it is out of context?

The Court: That's what I assume.

Mr. Kennedy: No——

The Court: All right. That would be part of your case in chief.

Mr. Kennedy: I am going to read some answers —parts of the deposition that explain some of the answers.

The Court: That will be in your case in chief.

Mr. Kennedy: Very well. [63]

Mr. Bosch: At this time, your Honor——

The Court: Well, now, let's see. If the witness was here and upon interrogation gave those same answers by way of cross examination he could bring out an explanation. I think you may proceed, Mr. Kennedy.

Mr. Kennedy: Thank you, your Honor. Commencing at Page 38, Mr. Vosburg, and Mr. Bosch. This is my cross examination:

(Deposition of Art Allen McKinzie.)

"Q. Mr. McKinzie, if I understand you correctly, at the time of the accident you had a California driver's license? A. Right.

Q. And at the time you took out the insurance with Mayflower Insurance Exchange you had a California driver's license, is that correct?

A. That is correct.

Q. At the time you bought this car, as I understand it, this fellow at Sam's Auto Mart referred you to—— A. Sam himself.

Q. Do you remember his last name?

A. I don't recall his last name.

Q. Is it Dardano? A. That's right.

Q. What did he tell you about?

A. I think it is an Italian. [64]

Q. What did he tell you?

A. He told me the agent to go to and called on the 'phone and made prior arrangements for me to go down there.

Q. Do you know what he told him on the 'phone?

A. I don't recall now, no.

Q. You went from there down to City Finance?

A. Correct.

Q. How did you happen to go to City Finance?

A. Through Sam.

Q. He told you to go to City Finance, too?

A. Yes. He did all of the arranging of the financing who it would be through.

Q. So you arrived at this agent's office, it was pretty late, is that right?

A. That's right, 6:00 p.m."

(Deposition of Art Allen McKinzie.)

Now, Mr. Vosburg and Mr. Bosch, I am skipping down to the one, two, three questions and answers which have already been read.

"Q. Now, I am a little bit confused about when you moved up here from California. When did you first go to California, say, after 1947?

A. '52. Well, I was down there in '51, came back and worked on the dam and went back in '52.

Q. Back in California in '52? A. Yes. [65]

Q. Then when did you come back to Oregon?

A. In '56, first part of '56.

Q. And then you stayed here since that time?

A. Uh-huh, but we didn't intend staying here at the time we came up.

Q. It was a temporary visit? A. Uh-huh.

Q. You planned to go back to California?

A. We planned going back, yes.

Q. Now, do you recall specifically that the insurance agent gave you a copy of this application?

A. I don't remember whether he did or not now.

Q. Do you have a copy of this application?

A. I don't know if I do or not, I will have to look at my papers at home. I have them all at home, my wife has them.

Q. I take it you are not sure whether he gave you a copy or not, is that right?

A. I don't recall if he gave me a copy exactly like that or not, but I think I have one, though.

Q. And I believe you testified it took about ten minutes to fill out the application?

A. That's right.

(Deposition of Art Allen McKinzie.)

Q. Could it have been less than ten minutes?

A. No, I think it was ten minutes, I think. [66]

Q. Did he look at your car, the agent?

A. He didn't come out and look at it, no, the agent didn't. He saw me drive by, he never came outside and examined the car at all.

Q. Did you tell him you had a California driver's license? A. No, he never asked me.

Q. He never asked you?

A. He never asked me if I had any license at all."

Now, skipping the next question and answer which has already been read—well, it goes down one, two, three, four, which have already been read.

"Q. If you received a copy of the application, where would it be now? A. At my wife's.

Q. Did you receive the insurance policy itself?

A. Yes, I have the policy.

Q. Did City Finance receive a policy, do you know?

A. I imagine they did, I had $50 deductible and, of course, they wouldn't have anything to do with the liability insurance policy. All they were interested in was the $50 deductible.

Q. Did you have any conversation with the agent as to whether you were taking out $5,000, $10,000 liability [67] insurance or $10,000-$20,000 liability insurance?

A. Well, I was led to understand it was good at $20,000.

(Deposition of Art Allen McKinzie.)

Q. Did you talk to him about that, the difference in rates and things like that?

A. No, we didn't discuss that much."

Mr. Bosch then said, "I didn't understand the answer."

Mr. Vosburg: Do you want me—"We didn't"—do you want me to continue?

Mr. Kennedy: Yes.

Mr. Vosburg: "A. We didn't discuss that, I don't recall. What I wanted was some kind of liability for the car, so he just wrote it up.

Q. Did you make any report of this accident of June 8th, 1957, to the State?

A. I haven't even got out of the hospital. I made a report but they never made — sent any papers.

Q. Do you know if anybody made any report on your behalf? A. I don't think so.

Q. Did you report this accident to Mayflower or have someone report it for you?

A. Evidently the doctors down there must have reported for me, because I had insurance card in my wallet and [68] I was out of my head for two weeks so they evidently must have reported it.

Q. That is in Newport, you are talking about?

A. Yes.

Q. You were first in a Newport hospital, is that right? A. Yes, down at Newport.

Q. When did you say the insurance adjuster from Mayflower Insurance Exchange first contacted you? A. The exact date?

(Deposition of Art Allen McKinzie.)

Q. Well, as best you can remember.

A. Came up here to the hospital to see me?

Q. Yes.

A. It must have been in August, around the first part of August, close to around in there.

Q. Was that the first time he talked to you?

A. That is correct, he got a statement from me. And the next—City Finance man came up with a check.

Q. Did he take a statement from you at the time? A. The adjuster?

Q. The adjuster.

A. Yes, he asked me how the accident happened."

Mr. Bosch: If the Court please——

The Court: Yes.

Mr. Bosch: ——what goes from here is not relative to these representations. It refers to the adjusting in the [69] remarks that were made after the accident. It doesn't go——

The Court: Do you contend it applies to what was read?

Mr. Kennedy: I think it's proper cross examination, your Honor.

The Court: Only to the extent of what was examined by the plaintiff. Now, I realize your position has been throughout this proceeding that the whole deposition should be offered.

Mr. Kennedy: That's right.

The Court: Now, either party has the right to offer it upon the condition being met to comply

(Deposition of Art Allen McKinzie.)

with the rule. But, bear in mind, the party reading this had offered it only for the single purpose of claimed statements by a party against his interest. That's all that you have the right to cross examine on.

Where did you leave off?

Mr. Vosburg: He asked me the question about the adjuster—about the adjuster. (Indicating) That one.

The Court: I see.

Mr. Bosch: Your Honor, I think we enter into the matter again beginning on Page 45.

The Court: Beginning on Page 45, yes. I believe that you may start with the first question on top of Page 45.

Mr. Kennedy: Thank you, your Honor.

The Court: Then continue through to the question in [70] the middle of the Page 46: "Did you have any discussion * * *"

Mr. Kennedy: Thank you.

"Q. Now, you testified that you had some type of a permit or receipt or an application for an Oregon driver's license, I believe back in 1956, is that correct? Do you understand my question?

A. In '56, that is when I made application.

Q. Did you receive some type of permit?

A. Well, yes, I had a driver's permit up until I received my license. And I never received my license.

Q. You applied for your license at some place with the State, is that right? A. That's right.

(Deposition of Art Allen McKinzie.)

Q. And they issued you——

A. A driving permit.

Q. Was it a temporary driver's permit?

A. A temporary driver's permit until you receive the driver's license.

Q. Until you receive your formal driver's license from the State? A. That's right.

Q. You did receive that?

A. I didn't receive the driver's license.

Q. But you received your permit?

The permit, yes, permit. [71]

Q. But you never received the driver's license itself? A. No.

Q. Now, this charge of 'no muffler' in Corvallis, did that involve your brother's truck?

A. Yes, uh-huh, my wife's brother's.

Q. Your wife's brother's? A. Yes.

Q. He didn't have a muffler on his truck?

A. The muffler fell off in the woods, uh-huh.

Q. But you were driving the truck at that time?

A. That is correct. He was sick that day and so he asked me to take a load in for him. He had a loan on his truck and I took it into Corvallis to the feeder plant there."

Excuse me, your Honor. I don't know whether the Court's ruling included the next question or whether I should stop here.

The Court: I will have to look at it. I thought we got into those objections. Yes. I think that you are going afield commencing with the question: "Did you have any discussion * * *"——

Mr. Kennedy: All right.

The Court: ——as to the balance of your cross examination.

Mr. Kennedy: That's all. Thank you very much, Mr. Vosburg. [72]

The Court: I believe I will give that to the Clerk.

Mr. Bosch: Your Honor, at this time I would like to offer into evidence what has previously been marked for identification as Plaintiff's Exhibit No. 7 and Plaintiff's Exhibit 19 which are, respectively, the reports from Oregon and California.

The Court: Any objection to 7?

Mr. Kennedy: Is 7 the Oregon, your Honor?

The Court: Certified copy of Motor Vehicle Driving Record of Oregon.

Mr. Kennedy: No, no objection.

The Court: It will be received.

(The State of Oregon Certificate, having been previously marked for identification, was received in evidence as Plaintiff's Exhibit 7.)

The Court: The next one was 14?

Mr. Bosch: 19.

The Court: 19. 19-A through G. 19-A through 19-G, both inclusive, appear to be abstracts of driving records of defendant from California.

Mr. Kennedy: May I examine that, your Honor?

The Court: Yes, indeed you may.

Mr. Kennedy: Your Honor, the defendant will object to these documents. I do not believe they are in proper form [73] of a certified copy of any-

thing. And they do not indicate what the particular charge or warning is supposed to indicate.

The Court: Very well. Let me see them. I take it 19-A is the operator's license from California.

Mr. Bosch: Yes, your Honor.

The Court: Now, may I inquire? First of all, are you objecting to these documents on identification?

Mr. Kennedy: No. I have admitted the identification.

The Court: The identification. Very well.

Mr. Kennedy: But, I do not believe that they are in sufficient form to—they indicate that they are supposedly violations or warnings. Some of them are—one in particular is beyond three years of the date of the application. It has no revelancy. And also for the purpose of the record, although it's possibly premature, I think that the insurance company is bound by the grounds of their rescission stated in their letter to Mr. McKinzie of September 23rd, 1957, which does not include the matters which are being offered at the present time.

The Court: Where is that? That letter has not been offered in evidence yet, has it?

Mr. Bosch: No. But I expect to offer it.

Mr. Kennedy: Would you offer it, please?

The Court: Now, picking up 19-B, can this Court take judicial knowledge of Code Section 577?

Mr. Bosch: I would expect the Court to do so. And, for assistance to the Court in that respect I have a copy of West Annotated California Codes

which refers to the Code sections which are used in those exhibits.

The Court: That is state law as distinguished from municipal order?

Mr. Bosch: Yes, your Honor. This is the state code.

The Court: This Court is bound to take judicial knowledge of the laws of the various states of the United States and possessions, as well as the executive acts of a sister state. So, I hold that Plaintiff's Exhibit 19-A, being an administrative act of the sister State of California, being the purported operator's license, will be received in evidence.

(At this point a photostatic copy of California Operator's License of Art Allen McKinzie was marked for identification and received in evidence as Plaintiff's Exhibit 19-A.)

The Court: Exhibit 19-B, being an executive order, administrative act of the State of California, will be received.

(At this point a photostatic copy of a document purporting to be an abstract of judgment was marked for identification and received in evidence as Plaintiff's Exhibit 19-B.)

The Court: The same applies to 19-C. It will be received.

(At this point a photostatic copy of a document purporting to be an abstract of judgment was marked for identification and received in evidence as Plaintiff's Exhibit 19-C.)

The Court: I would suggest D is not within the three years——

Mr. Bosch: If that's so, your Honor, then I will not urge, certainly, that it be——

The Court: Take a look at it.

Mr. Bosch: Your Honor, the date is April 16, 1957. As I read this the date of the violation on this is 4-6-55.

The Court: Oh. '55?

Mr. Bosch: Yes, your Honor.

The Court: Oh, I beg your pardon.

Mr. Bosch: That comment, as I remember it—I think maybe there are some that are past the three years and I will not urge——

The Court: The same as applies——

Mr. Bosch: ——urge the admission of those beyond the three years, admitting that they are not relevant.

The Court: 19-D will be received. [76]

(At this point a photostatic copy of a document purporting to be an abstract of judgment was marked for identification and received in evidence as Plaintiff's Exhibit 19-D.)

The Court: What do you claim for 19-F?

Mr. Bosch: That would be three years and two weeks, your Honor, so I withdraw my offer of that.

The Court: It will be rejected. I believe E bearing the date of 3-7-54—E and F will be rejected. What do you claim for G?

Mr. Bosch: Your Honor, only this, and not too strenuously: but if the facts have been correctly represented here it would have afforded the plain-

tiff an opportunity to make its own investigation which would have disclosed the information which is in 19-G.

The Court: Well, I will go with you on that.

Mr. Bosch: To that extent it would be relevant.

The Court: I will withdraw that. Your theory goes to these others. I will reject G.

Mr. Bosch: Your Honor, I note that it is drawing close to 5:00 o'clock.

The Court: Do you have any more preliminaries? Are you about to go into your evidence now?

Mr. Bosch: I expect to call another witness, the man that took the application. [77]

The Court: How long would that last?

Mr. Bosch: I wouldn't expect mine will be very extensive.

REUBEN SNYDER

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined, and testified as follows:

Mr. Bosch: Mr. Snyder, it's important that you speak sufficiently loud or loudly so that the people at the end of the jury box can hear you.

The Witness: Yes.

Direct Examination

Q. (By Mr. Bosch): Would you state again for their purpose in case they didn't hear you earlier your full name?

A. Reuben Edward Snyder.

Q. And where do you live, Mr. Snyder?

(Testimony of Reuben Snyder.)

A. 3003 Northeast 15th, Portland.

Q. In April of 1957 were you employed by the Bucholz Insurance Agency? A. Yes, I was.

Q. And was that agency an authorized representative of Mayflower Insurance Exchange? [78]

A. Yes, they were.

Q. Mr. Snyder, the Crier is handing you what has been introduced in evidence in this case as the Plaintiff's Exhibit No. 1. A. Yes.

Q. Do you recognize what that is? A. Yes.

Q. Now, on April 16, 1957, did you have occasion at the office of Mr. Bucholz where you were working to take the application from Mr. McKinzie for his insurance policy? A. Yes, I did.

Q. In the course of doing that did you fill out the application which is in front of you and marked, identified as Plaintiff's Exhibit No. 1?

A. Yes; I filled it out.

Q. How much of the handwriting on that sheet was made by you?

A. All of it except Mr. McKinzie's signature and some home office code here that was——

Q. Can you identify the home office writing or marks, or whatever they are? A. Yes.

Q. As distinguished from what you put on it?

A. Yes, I can.

Q. How would you do that?

A. Well, they're all in red ink. [79]

Q. Would it be correct to say that everything other than Mr. McKinzie's signature which is in blue ink was your handwriting?

(Testimony of Reuben Snyder.)

A. Yes; all except the signature. There is a notation on the top, "Plaintiff's"——

Q. Well——

A. ——"Deposition Exhibit 1." But other than that——

Q. And does your remark apply equally as well to the back of that exhibit? A. Yes.

Q. Now, Mr. Snyder, can you tell us about what time of day you took this application from Mr. McKinzie?

A. It was late afternoon at close to 6:00 o'clock.

Q. Do you recall whether there was anyone else in the office or not? A. No; there were not.

Q. Then you were in the office all by yourself at the close of the day? A. Yes.

Q. Now, when Mr. McKinzie came in was anyone with him? A. No; he was alone.

Q. So there were just the two of you in the office this day when you took the application?

A. Yes.

Q. Now, and just as best you can, do you recall the very [80] words that were used? Do you recall what Mr. McKinzie said to you when he came in the office?

A. Well, he asked—he told me that he would like to insure an automobile.

Q. Then what did you do?

A. I reached for an application and put it on the counter and proceeded to ask him the questions.

Q. What questions are you referring to?

A. Well, the questions on the application: His

(Testimony of Reuben Snyder.)

name—I asked his name, his address, and he told me. I wrote that down.

The Court: I think this is a good place to interrupt. You are getting into the substance.

Members of the jury, we will recess for the evening. Recall the admonition of the Court. Do not discuss the matter among yourselves nor permit any person to discuss it with you.

Tomorrow morning at 10:00 o'clock, please. 10:00 o'clock, please.

(At 5:00 o'clock p.m. this date Court adjourned.) [81]

Morning Session

(At 11:20 o'clock a.m. Court reconvened this matter.)

Mr. Bosch: Mr. Snyder, would you resume the stand, please?

(At this point Mr. Snyder resumed the witness stand, having been previously sworn, and was examined and testified as follows:)

The Court: You have been sworn. Just have a chair. Recall your oath, sir.

Direct Examination—(Continued)

Mr. Bosch: Would you hand him a copy of the application which he had yesterday?

(At this point the Crier did as requested.)

Q. (By Mr. Bosch): Mr. Snyder, it's my recollection when we recessed last evening, yesterday afternoon, you were just commencing to tell the

(Testimony of Reuben Snyder.)

jury and the Court what transpired when Mr. McKinzie came into your office on 39th and requested that you write some insurance for him. Now, you still have before you what has been introduced into evidence as Plaintiff's Exhibit No. 1. Had you ever known Mr. McKinzie before this day on April 16th?

A. No.

Q. Now, will you tell us again—perhaps it may be somewhat [82] repetitious — but again, what transpired from the time that Mr. McKinzie came in the door of the office and what was said by him and by you?

A. Well, he walked in and asked for insurance on an automobile. And I picked an application up and proceeded to ask him his name and address and occupation. Gave those to me.

Q. May I interrupt you a moment, Mr. Snyder? This application that you referred to, is it one copy or is it a number of copies, or can you tell us about that?

A. No. It's three copies. It's made up one for the home office, one for the insured and one for our own file.

Q. I see. There is a carbon——

A. Carbon paper.

Q. Excuse me. Go ahead.

A. He gave me the occupation, name, and address, and I put them down. And the effective dates to determine the length of the policy and what type of coverage that he wanted and description of the car. I asked him the make and model, the cost of

(Testimony of Reuben Snyder.)

the automobile, and I wrote that down and figured the price and asked him if there was any loss payable, the name of the finance company, and put that down. Then went on to ask him the underwriting statements—or, the applicant's statement. And I asked him, "Any physical impairments?" and he said, "No."

Q. Let me interrupt you a moment, Mr. Snyder. Are you [83] saying that you read these out loud to him just as they are printed on this application? A. Yes; I read them out loud.

Q. And he responded out loud? A. Yes.

Q. And the answers which he gave you out loud are the ones that you put on here in your own handwriting? A. Yes; that's right.

Q. Go ahead.

A. Well, I went on through the applicant's statement reading the questions and—"Had the insurance been cancelled or refused, any license revoked or suspended, citations or fines?" and he proceeded to give me a "No" answer. Went on through the statements, where he worked, and he told me different—his age and whether he was married or single and he told me, and as he told me I wrote that down.

I asked him about unrepaired damage to the car and he told me "No"—or, he told me that there was none and I put that down.

Q. Now, after you finished the completion of all that information what did you do then, Mr. Snyder?

A. After we completed the applicant's state-

(Testimony of Reuben Snyder.)

ment I dated the application and returned it to him for his signature.

Q. At this time when you were talking with Mr. McKinzie how were you located? Were you sitting in chairs or were you—one standing—— [84]

A. No. We were both standing, one on one side of the counter and one on the other.

Q. You were face to face with the counter between you? A. Yes.

Q. I see. I interrupted you when you said you returned the application to him for his signature. Go ahead.

A. And he signed the application.

Q. Then was anything else said?

A. Well, the money part of it came up, how it was to be paid. And he asked if he could pay something down and the remainder at a later date, and I told him that he—I am quite sure mentioned or asked me if twenty dollars would be sufficient and I said it would. I made—he paid me the money, I made the receipt, gave him a copy of his receipt, a copy of the application, and he left the office.

Q. All right. Now, Mr. Snyder, directing your attention to the other side of this application, Plaintiff's Exhibit No. 1, the information there, when was that filled in?

A. The information on the back was, possibly, the next day.

Q. Now, I notice that that information on the back bears the signature in two places of George Bucholz as agent. A. Yes.

(Testimony of Reuben Snyder.)

Q. Did Mr. Bucholz sign that? Is that his signature? A. No. [85]

Q. Who signed his name?

A. I signed it.

Q. Is that the ordinary practice in your office to—— A. Yes; I sign.

Q. Mr. Bucholz is the agent, your employer?

A. That's right.

Mr. Kennedy: Are you offering this?

Mr. Bosch: Yes.

Mr. Kennedy: No objection, your Honor.

Mr. Bosch: Hand it to the witness, please.

(Whereupon the Crier did as requested.)

Q. (By Mr. Bosch): Mr. Snyder, the bailiff has handed to you what has been introduced in evidence as Plaintiff's Exhibit No. 2. Will you tell us and the members of the jury what that is?

A. Yes. This is a receipt. The district agent's copy or our office copy of a receipt that I made out and gave to Mr. McKinzie. Gave him a copy for him. It's in triplicate; a copy for the—for McKinzie or the insured, the agent, and the home office. This is the district agent's copy or our copy of that receipt.

Q. How much money? A. Twenty dollars.

Q. Now, I understood you to say that this application was made up in triplicate. Will you tell us where those various—where those three copies go? [86]

A. Of the application?

Q. Yes.

(Testimony of Reuben Snyder.)

A. One stays in our office, one is given to the insured, one is mailed to the home office.

Mr. Bosch: I see. Your Honor, has Plaintiff's Exhibit No. 2 been received?

The Court: No, it has not.

Mr. Bosch: I offered that.

The Court: Any objection.

Mr. Kennedy: No objection, your Honor.

The Court: It will be received.

(At this point a pink document purporting to be a receipt entitled District Agent's Copy was marked for identification and received in evidence as Plaintiff's Exhibit 2.)

Q. (By Mr. Bosch): Did I understand you to say, Mr. Snyder, that one of these copies was mailed on this particular application to the home office?

A. Was mailed to the home office?

Q. Yes. A. Yes.

Q. That copy that appears in front of you which is introduced into evidence as Plaintiff's Exhibit No. 1, is that [87] the copy that was mailed to the home office?

A. This is the original copy, the home office copy.

Mr. Bosch: No further questions.

The Court: Cross examination.

Mr. Kennedy: Your Honor, may I have Mr. Snyder's deposition made a part of the record?

The Court: Was it in the file? That is Reuben Edward Snyder?

Mr. Kennedy: Yes.

(Testimony of Reuben Snyder.)

The Court: Let the record show that there is among the files of the cause in the hands of the Clerk a sealed envelope bearing the legend "Deposition of Reuben Edward Snyder Taken in Behalf of Defendants," bearing the Clerk's filing date of March 11, 1958. Will the Clerk please break the seal and remove the contents and mark the same Defendants' Exhibit 20 for identification.

(At this point a deposition of Reuben Edward Snyder taken on February 21, 1958, was marked for identification as Defendants' Exhibit 20.)

The Court: Are there any objections to the publication of the deposition?

Mr. Bosch: None, your Honor.

The Court: The deposition will be published and made a part of the record of the cause. It is ordered published. [88]

Mr. Kennedy: May I proceed, your Honor?

The Court: Indeed you may.

Cross Examination

Q. (By Mr. Kennedy): Mr. Snyder, how long have you been employed by Mr. Bucholz?

A. Approximately two years.

Q. In what capacity?

A. As—actually, as office manager.

Q. You are the office manager?

A. I was, yes.

Q. What is your capacity right at the present time?

(Testimony of Reuben Snyder.)

A. I am not—no longer with Mr. Buchholz.

Q. I see. Mr. Bucholz was an agent for Mayflower Insurance Company, was he not?

A. Yes, he was.

Q. And he writes directly for Mayflower Insurance Company? A. Yes.

Q. Had you worked for Mayflower Insurance Exchange prior to your employment with Mr. Bucholz? A. Yes, I had.

Q. And when and where was that?

A. Out of the North Portland office under Bob Bricker.

Q. And—— [89]

A. And then in the West Burnside office as a substitute agent and also in Milwaukie as a substitute agent.

Q. And for how long a period of time?

A. Well, it started in September—well, it started in '55 in the North Portland office and went on through.

Q. Mr. Snyder, do you recall Mr. McKinzie being in your office and making an application for this insurance? A. Yes.

Q. Mr. Snyder, I am afraid I am a little bit confused. Do you recall when your deposition was taken in Mr. Bosch's office on February 21st, 1958?

A. Yes.

Q. And that you were placed under oath at that time? A. Yes.

Q. Now, I am going to ask you, Mr. Snyder, if you recall the following questions and the fol-

(Testimony of Reuben Snyder.)

lowing answers that you gave at that time. Would you like a copy of your deposition?

A. It would be all right.

Q. Now, I am referring to the bottom of Page 8, Mr. Snyder, right at the bottom. A. Yes.

Q. Do you recall the following question and answer:

"Q. Do you recall your discussion with Mr. McKinzie while he was in your office?

A. No, I don't. [90]

Q. You don't recall what was said by either one of you,—— A. No.

Q. ——I take it?

A. I was—other than the questions there, that's the only thing that I can——

Q. Well, what I am asking is, Mr. Snyder, do you have any recollection yourself as to what was said by either one of you at that time?

A. I just don't remember.

Q. You have no memory about it at all then; is that correct?

A. Yes, that's correct."

Do you recall those questions and answers?

A. Yes, I do.

Mr. Bosch: If your Honor please, I would like the record to show that those questions and answers were given before the deponent had an opportunity to have the copy of what he has testified to before this morning in front of him. The deposition will show that at this point Mr. Kennedy then handed him a copy.

(Testimony of Reuben Snyder.)

The Court: You may take that over on cross examination.

Mr. Bosch: All right, sir.

Mr. Kennedy: I think we can continue with that, Mr. Snyder. [91]

Q. Those were your answers at that time?

A. Yes, they were.

Q. Now, Mr. Snyder, turning to Page 10—or, rather, on the bottom of Page 9, first, do you recall these questions and answers:

"Q. Now, whose handwriting appears on this application, Mr. Snyder?

A. That's all my handwriting with the exception of the signature.

Q. And you have no independent recollection as to what was said or done at that time?

A. No.

Q. Is it a fair statement that you do not remember anything about it except just the mere fact of this application? A. Yes.

Q. Don't misunderstand me, Mr. Snyder; what I am trying to find out is if you know anything at all at the time when this application was prepared, I want to know about it. If you don't, you don't, and I take it that you do not know, you cannot recall anything that was said or done at that time?

A. No, that's right."

Were those the answers you gave to those questions? A. Yes, they were. [92]

(Testimony of Reuben Snyder.)

Q. And at that time you had the application in front of you, did you not?

A. I believe so. I think it was handed to me.

Q. Refer back to the middle of Page 9.

A. Middle of Page 9. Yes. Uh-huh.

Q. You had the application in front of you, didn't you? A. Yes.

Q. Now, Mr. Snyder, do you recall whether a person by the name of Mr. Sam Dardano who owns Sam's Auto Mart referred Mr. McKinzie to you?

A. No, I don't. I don't recall.

Q. You do not recall that he called you?

A. No.

Q. Does he ever call you with respect to prospective applicants? A. He has.

Q. And does he give you the information regarding the insurance that they want and the automobile, and things like that?

A. He may say he is sending someone down, he has purchased a Cadillac. But, information from a car dealer would not be enough. It wouldn't substitute for the man. The man has to be there. He has to come in. So it wouldn't make any difference. I wouldn't list him anyway.

Q. But, he does that on some occasions? [93]

A. He might tell me what kind of a car the man had purchased. May.

Q. Now, did I understand your testimony, Mr. Snyder, that you said that you gave a copy of this application to Mr. McKinzie? A. Yes, sir.

Q. I mean, do you directly recall that?

(Testimony of Reuben Snyder.)

A. Yes.

Q. You're not basing that on the usual practice, are you, Mr. Snyder, or do you have an independent recollection there?

A. I gave him a copy.

Q. I will refer you to Page 11 of your deposition, Mr. Snyder, starting with the question, and I will ask you if these questions were asked of you and if you gave these answers:

"Q. Perhaps you didn't understand my question. The question is, is it your usual practice to give a copy of the application to the applicant?

A. Yes, it is.

Q. Do you have any independent recollection that you actually gave a copy of this application to Mr. McKinzie, or is that just based on your usual custom?

A. Well, I am sure that I gave it to him.

Q. Do you remember that yourself from your own knowledge? [94]

A. No, but it is the usual practice.

Q. Your answer then is based on your usual practice? A. Yes."

Were those the answers you gave to those questions? A. Yes.

Q. Your testimony now is that you of your own recollection recall that you gave him a copy of the application? A. Yes.

Q. Is your memory better now, Mr. Snyder, than it was on February 21st, 1958?

A. I am quite sure it is somewhat, yes.

(Testimony of Reuben Snyder.)

Q. Now, what happened to the insurance policy in this particular case? Was it returned to you?

A. It was returned to our office from the home office.

Q. What did you do with it?

A. Well, actually, I have nothing to do with that part of the operation.

Q. I take it you do not know, then, or do you?

A. I know what happened to it, yes.

Q. Well, what happened to it?

A. There was a copy sent to the mortgagee, there was one to the insured, and a copy placed in our file.

Q. How long did it take to complete this application, Mr. Snyder?

A. I would say twenty, twenty-five minutes. [95]

Q. Do you recall it being twenty or twenty-five minutes? Do you recall of your own knowledge that it was twenty or twenty-five minutes?

A. You mean it was either twenty or twenty-five?

Q. Yes.

A. No, I didn't time myself on it, no.

Q. When did Mr. McKinzie come into the office, approximately?

A. Approximately? Approximately 5:30.

Q. Yes. And he left approximately when?

A. Approximately 6:00 o'clock.

Q. Now, as I understand it, Mr. Snyder, you signed the name of Mr. Bucholz, who was the agent, to the back of this agent's statement.

(Testimony of Reuben Snyder.)

A. Yes; that's true.

Q. Is it your normal practice to sign his name to these applications? A. Yes, it is.

Q. Then you forward it on to the insurance company? A. Right.

Q. Now, Mr. Snyder, getting back to this question of how long it took to complete the application, I again refer you to Page 7 of the deposition and ask you if the following questions were asked you and whether you gave the following answers:

"Q. How long did it take? [96]

A. Oh, it probably would take twenty-five minutes.

Q. Is that your best estimate of how long it took for Mr. McKinzie's application, or do you remember?

A. No, I don't remember."

Did you make those answers?

A. Yes.

Q. Mr. Snyder, I am confused. I mean, any explanation you want to make, go ahead and do so.

A. Well, at this time I was certain that you wanted me to put a definite—twenty-one and a half minutes, or something like that. Well, I cannot do that.

Q. What I wanted, then, Mr. Snyder, and what I want now is just what occurred. A. Yes.

Q. Do the questions and answers in your deposition refresh your memory any or do you still believe you have a definite recollection of what occurred in there?

(Testimony of Reuben Snyder.)

A. I have a definite recollection of the application. I don't know whether the man was dressed in a suit or whether he had a sport coat on or whether he said "Good morning!" or "Afternoon!" I don't know about that.

Q. What time does your office normally close?

A. Six o'clock.

Q. Well, you were the only one there at that time? A. Yes. [97]

Q. Could you describe Mr. McKinzie for us?

A. No.

Q. Could you give us any description of him at all?

A. He was, of course, a middle-aged man.

Q. Do you have Plaintiff's Exhibit No. 1 still before you, being the application? Do you have it before you now, Mr. Snyder? A. Yes.

Q. I direct your attention to the bottom of the application where, apparently, appears the signature of Mr. McKinzie. And you notice that there is a line or check mark placed there. Did you place that on the application? A. Yes, I did.

Q. And you placed it there for him to sign it, is that correct? A. That's correct.

Mr. Kennedy: That's all, Mr. Snyder. Thank you.

The Court: Redirect?

Redirect Examination

Q. (By Mr. Bosch): Mr. Snyder, referring again to this deposition which was taken in my

(Testimony of Reuben Snyder.)

office on February 21, 1958, and directing your attention to Page 16, these are questions which I put to you commencing at the foot of the page. The question was this: [98]

"Q. Mr. Snyder, directing your attention to that application which was, by your testimony, signed by Mr. McKinzie, you told us that all of the handwriting that appears on that application is yours except for that signature of Mr. McKinzie. Do you recall having secured the information that you put down in your own handwriting?

A. Yes."

Did you give the answer "Yes"?

A. Yes.

Q. "Q. Will you tell us how you secured the information?" Your answer was: "A. I stood at the counter and asked the man the questions." And I put the question:

"Q. Well, then, starting at the top of the application, just tell us exactly what you asked him and what he responded."

And you answered:

"A. Name——"

And I interrupted you:

"Q. You hadn't known his name before he walked in that day," and you responded: "No. Address——"

And then there was an interruption.

Mr. Kennedy: The interruption was that because I wanted the record to show that Mr. Snyder was then reading from the application. [99]

(Testimony of Reuben Snyder.)

Mr. Bosch: Yes.

Q. And then I put the question:

"Q. And as you would ask him these questions, he would respond and give you the answers and you put it down on the application; is that correct?" And you answered: "That's correct."

Do you recall my putting those questions to you and you giving those answers?

A. Yes, I do.

Q. And they are correct? A. Yes.

Mr. Bosch: I have no further questions, your Honor.

Mr. Kennedy: I have no further questions, your Honor.

The Court: That is all, sir. You may step down.

(Witness excused.)

Mr. Bosch: Your Honor, I notice it's almost 12:00 o'clock. Do you want me to call my——

The Court: So soon? It's right at 12:00 o'clock. Well, just for the record get him identified.

Mr. Bosch: Yes, your Honor. [100]

RAY T. CARLSON

produced as a witness in behalf of the Plaintiff, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Bosch): Mr. Carlson, where do you live?

A. In Seattle at 137 Lakeside Avenue.

(Testimony of Ray T. Carlson.)

Q. And by whom are you employed?

A. Mayflower Insurance Exchange.

Q. How long have you been employed by that company? A. Seven years.

Q. What is your job or employment with that company? A. Underwriting manager.

Q. That's your present capacity with them now, is that correct? A. Yes.

Q. Are you in charge of their underwriting department? A. Yes.

Q. Were you familiar with the underwriting policy of Mayflower Insurance Exchange in April 16th, 1957? A. Yes.

Mr. Bosch: Please hand him Plaintiff's 1.

(Whereupon the Crier did as requested.)

Q. (By Mr. Bosch): Mr. Carlson, the bailiff is handing you Plaintiff's Exhibit No. 1, which is the application signed by Mr. McKinzie. Will you tell the members of the jury what the [101] reasons are for asking these kind of questions that appear in the middle of that application?

Mr. Kennedy: Just a moment. Your Honor, I am going to object. It invades the province of the jury. The document speaks for itself. It calls for a conclusion.

The Court: May I have the question, please?

(At this point Mr. Bosch's last question to the witness was read by the Court Reporter.)

The Court: May I see it, please? I take it you have reference to——

(Testimony of Ray T. Carlson.)

Mr. Bosch: Referring to——

The Court: ——Applicant's statement 6 through 13?

Mr. Bosch: One through 13, your Honor.

The Court: Oh. One through 13?

Mr. Bosch: Yes. I might——

The Court: What is the purpose?

Mr. Bosch: I might say, your Honor, it is necessary in this case for the plaintiff to establish and prove that the representations made by the applicant, the insured, the defendant McKinzie, were material to the risk underwritten.

The Court: I understand that.

Mr. Bosch: And that they relied upon them. My question seeks an answer from this witness who is head of the underwriting department for the plaintiff asking him why these are—it's going to materiality. [102]

The Court: I think that you would be on safer ground in connection with your theory there if you asked him as an underwriter what were the processes he went through in either——

Mr. Bosch: All right, your Honor.

The Court: —— recommending — I assume he recommends or he may issue as an underwriter. I don't know. But you might still advise the jury what his duty as an underwriter is.

Mr. Bosch: Let me——

The Court: We will take a break here.

Members of the jury, we will recess for the lunch

(Testimony of Ray T. Carlson.)

hour. Recall the admonition of the Court. One-thirty this afternoon, please.

(At 12:00 o'clock noon Court adjourned.)

Afternoon Session

(At 1:30 o'clock p.m. Court reconvened pursuant to noon recess.)

The Court: You may continue.

(At this point the witness resumed the stand.)

Q. (By Mr. Bosch): Mr. Carlson, will you explain to the Court and jury what happens to an application when it arrives at your home office in Seattle?

A. If I may skip the preliminaries of its going through the mail, it arrives on the underwriter's desk and he reviews it from top to bottom in more or less the same order that the questions or statements are made on the application. Every question or statement is important. The name and address, occupation, of course, are necessary to identify the insured.

The information on the card is necessary to identify the type of vehicle we are insuring. The coverages are reviewed to see that the limits agree with the limits that can be written by the company and that we will write or won't write certain coverages on the type of car that is submitted for a policy.

The application is reviewed in respect to the mortgagee or lien holder to see that we have sufficient address.

(Testimony of Ray T. Carlson.)

In respect to the applicant's statements which [104] are the most important to the underwriter, those are reviewed to see whether this particular applicant is an acceptable risk.

Q. Well, on this particular application, Plaintiff's Exhibit No. 1, is there anything on that from which you can determine that something was added when it arrived at your underwriting department? In other words, was anything added to that particular application after it left the agent's office, arrived in your underwriting department?

A. Certain information such as our statistical coding.

Q. Well, as I remember the testimony of the previous witness, Mr. Snyder, he identified what he put on the application as being in one color of ink and that some of the things were there in a different color were not his. On that application are there some marks, some figures, and whatnot, that are in red ink? A. Yes.

Q. Would they be put on there by your underwriting department? A. Correct. Yes.

Q. Now, on this particular application, after it had left the underwriter would he make any notation on it as to whether it was approved or not?

A. Yes, he does.

Q. Is there such a notation on that exhibit. Plaintiff's Exhibit 1? [105]

A. Yes.

Q. Now, from the underwriter where would the application go?

(Testimony of Ray T. Carlson.)

A. From the underwriter it would go to a rate clerk that——

Q. Beg your pardon?

A. It goes to a rate clerk that checks the rates that are listed by the agent to see they are correct according to the manual and from the rate clerk it goes to the department that prints the policy.

Mr. Bosch: Would you hand the witness, please, Exhibit No. 3?

(Whereupon the Crier did as requested.)

Q. (By Mr. Bosch): Mr. Carlson, the bailiff has handed to you what has been introduced into evidence as Plaintiff's Exhibit No. 3, a true copy of the policy. Will you explain to the jury how that—where that comes into existence as the application is processed through the office?

A. Our policies are printed up in our IBM department. I assume most people are familiar with IBM equipment. Some companies type them up. But ours are printed by machine.

This application goes into the IBM department and they punch up a card with all—containing all the information on the application and those cards are run through the IBM machines and they in turn imprint on this policy form. The information contained on the policy form is identical with the information on the application. [106]

Q. I see. Then Plaintiff's Exhibit 3 is the policy which was issued upon this particular application? A. Yes.

Q. I see. Now, Mr. Carlson, you have sat here

(Testimony of Ray T. Carlson.)

during the course of this trial and you have heard the testimony which has been put on here, primarily the deposition of Mr. McKinzie, which was in a dialogue form; also the documentary evidence as to the driving record in the State of California and the State of Oregon. Apparently from those there is a conflict, from those and the statements set forth in the applicant's statement No. 1. If, as the information which has now been developed to be the true information had been reflected on this applicant's statement, would the company have issued this particular policy?

A. Definitely not.

Mr. Kennedy: I object to that, your Honor. It calls for a conclusion. It goes to the very question at issue here. It invades the province of the jury.

The Court: Well, of course, the statement in the question assumes a fact that may or may not—asserts a fact that may or may not be true. So, the jury can determine whether or not that is true.

Now, if you want to lay a hypothetical——

Mr. Bosch: All right, your Honor. [107]

The Court: ——and then ask under the rules in existence at that time of the company what would have been the underwriter's duty at that time, you may do so.

Q. (By Mr. Bosch): Assume this state of facts, Mr. Carlson: Assume this particular application came to your underwriting department in Seattle, having been forwarded there by your local office

(Testimony of Ray T. Carlson.)

here in Portland; and the answers to these various questions under the applicant's statements were answered this way: "Have you or any driver of this car any physical impairment?" and the answer there was "No"; "Had any license revoked or suspended?" and the answer there was "Yes"; "Received any driving charges, citations, or fines (not parking) in the past three years?" and the answer there "Yes"; and, then, the second question: "Name of previous insurer? None"—well, I guess, "Some." "Some," not meaning any particular company, but indicating that there had been a previous insurer. Instead of the word "None," "Some." On the basis of that application, and assuming that all the rest of the application was as it appears before you on the Plaintiff's Exhibit 1, would the company with that application under those assumed facts have underwritten this particular insurance policy and issued it to Mr. McKinzie?

A. No.

Q. Now, Mr. Carlson, in April of 1957 at the time that this application was received in the home office, was there a [108] company policy in the underwriting department at that time that was expressed that the company would not issue a policy to anyone who had previous suspension of license?

Mr. Kennedy: I am going to object to that, your Honor. The customary policy of the company certainly isn't binding upon Mr. and Mrs. Gilmont in this case.

(Testimony of Ray T. Carlson.)

The Court: May I have the question, please?

(At this point Mr. Bosch's last question to the witness was read by the Court Reporter.)

The Court: Well, you say "policy."

Mr. Bosch: Perhaps——

The Court: If it had been important to this witness who says he processed this application—if he can tell what instructions or what his duties were with reference to that, it would be for the jury to tell whether he performed his duties or not.

Q. (By Mr. Bosch): Mr. Carlson, were there very definite instructions given to the members of the underwriting staff in the home office of the plaintiff insurance company that no underwriter would accept as a risk and issue an automobile liability policy to an applicant who truthfully reflected to the company that his license had previously been suspended or revoked?

A. That is correct. [109]

Q. And the underwriters had no authority whatever to issue a policy under those circumstances?

A. No. If I may——

The Court: You may explain.

The Witness: If I may explain that, the underwriting manager in consultation with management could issue a policy under those circumstances. The possibility of such being done would be very meager.

Mr. Kennedy: Excuse me, your Honor. Could I ask some preliminary questions?

The Court: Yes.

(Testimony of Ray T. Carlson.)

Mr. Kennedy: Do you have written rules and regulations regarding your underwriting policy?

A. Yes, we have a manual.

Mr. Kennedy: Thank you.

Q. (By Mr. Bosch): Mr. Carlson, at the time that this application was received in April of 1957 were the underwriters in your Seattle office likewise instructed that they could not accept and insure as a risk a person who had three traffic violations, citations, or fines within three years prior to the date of the application?

Mr. Kennedy: Excuse me, Mr. Carlson. I am going to object to that, your Honor, on the grounds that they, apparently, have written manuals and underwriting instructions. I think they would certainly be the best evidence. [110]

The Court: They would certainly be the best evidence, no doubt. I take it that you have no number reserved.

Mr. Bosch: No, your Honor. I did not expect to offer it. But it is available.

The Court: It will be Plaintiff's 22.

(At this point an Agent's Manual, Mayflower Insurance Company, was marked for identification as Plaintiff's Exhibit 22; and a manual entitled "Rules and Rates, Mayflower Insurance Company," was marked for identification as Plaintiff's Exhibit 23.)

Q. (By Mr. Bosch): Mr. Carlson, the bailiff has handed to you what has been marked for identification as Plaintiff's Exhibit 22. Would you ad-

(Testimony of Ray T. Carlson.)

vise the Court and the members of the jury what that is?

A. This exhibit is a list of instructions——

Q. I am referring, now, to 22, Mr. Carlson. I think that was the large one that went in first.

A. This is a manual that is given to all agents and, also, every underwriter has a copy, giving certain underwriting rules and regulations.

Q. Now, will you direct your attention to what has been marked for identification as Plaintiff's Exhibit No. 23 and, likewise, advise the Court and members of the jury what that is? [111]

A. That is basically the same as the other exhibit.

Q. Are there any other instructions written or otherwise that govern the actions of the underwriters in this particular company other than the manual?

A. The only other things would be memorandums, from time to time, on particular instances.

Q. These manuscripts, volumes, documents, whatever you like, marked for identification as Plaintiff's Exhibits 22 and 23, were these the manuals that were in force and effect and used by the company on April 16, 1957?

A. This Exhibit 23 was the main one in use at that time.

Q. Was 22 likewise in——

A. 22 was used to a certain extent, yes.

Mr. Bosch: We have no further questions, your Honor.

(Testimony of Ray T. Carlson.)

The Court: Cross examine?

Mr. Kennedy: Were you going to offer the manual, counsel?

Mr. Bosch: Yes, your Honor, we will offer them.

Mr. Kennedy: We have no objection.

The Court: They will be received, 22 and 23.

(The two manuals, having been previously marked for identification, were received in evidence as Plaintiff's Exhibits 22 and 23.) [112]

Cross Examination

Q. (By Mr. Kennedy): Mr. Carlson, how long did you testify you have been employed by Mayflower? A. Seven years.

Q. And you are the manager of the underwriting department? A. Correct.

Q. How many states does that cover?

A. Five.

Q. And is that Western States, primarily?

A. Primarily.

Q. And have you been engaged in the insurance business before your employment by Mayflower?

A. Yes.

Q. And for how long? A. Four years.

Q. What company did you work for then?

A. Northern Life Insurance Company in Seattle.

Q. A life insurance company? A. Yes.

Q. Not an automobile casualty company?

A. No.

(Testimony of Ray T. Carlson.)

Q. Now, are you familiar with the claims procedure contained in those manuals, Mr. Carlson?

A. These are basically underwriting manuals. [113] There is a certain section on claims. The basic purpose of the manual was for underwriting, however.

Q. I see. Isn't it a fact, Mr. Carlson, that among the instructions of the company that it is the first duty of an adjuster or claims department to determine the question of coverage; is that correct or not? A. That is always necessary.

Q. That's the first thing you determine, isn't it?

A. Yes.

Q. I mean, that's what you first investigate, the very first thing that you determine? A. Yes.

Q. And from then on you proceed to adjust the risk, is that correct? A. Yes.

Q. Now, Mr. Carlson, do I understand—or, did I understand your testimony—or was it Mr. Bosch's opening statement? — that it's a general practice among casualty companies to take written applications such as this? A. Yes.

Q. You say it is? A. Yes.

Q. Are you familiar with Travelers Insurance Company, their form?

A. I can't say that I am, no. [114]

Q. Are you familiar with Hartford Insurance Company, their forms?

A. I can only answer this way: I have seen a good many forms from other companies. I couldn't

(Testimony of Ray T. Carlson.)

tell you now the names of those companies. Perhaps I have seen them and perhaps I haven't.

Q. Now, Mr. Carlson, is it the practice of the company to make a credit investigation of applicants for insurance? A. At times.

Q. At times? A. At times.

Q. And what organizations do you use?

A. Cooper-Holmes and Retail Credit, generally.

Q. That's a situation where they go out and talk to the neighbors and ask what type of a person they are, and so on, and so forth; is that right?

A. They may talk to neighbors, yes.

Q. Isn't that the usual practice, Mr. Carlson? Or, do you know?

A. It depends on the particular practice of the company that orders the investigation. Some companies do not wish the investigators to—excuse me. I thought you meant talk to the applicant. You were correct. They ordinarily would talk to the neighbors and other informants.

Q. And you, then, are able to determine the general character [115] of your applicant and the desirability of a risk, isn't that correct?

A. To a certain extent, yes.

Q. And you usually conduct those investigations immediately after you receive the application?

A. When they are conducted, yes.

Q. Even though you might issue an insurance policy you still sometimes conduct those investigations and if it is unsatisfactory, then, you cancel them out, is that right? A. At times, yes.

(Testimony of Ray T. Carlson.)

Q. Now, do you follow a practice, Mr. Carlson, of obtaining from the various state agencies a record of the driving experience of each applicant?

A. There again, like investigations, we order them at times, not in all cases, no.

Q. Yes. In other words, in some cases you apply to the Director of Motor Vehicles, say, of the State of Oregon and ask for an abstract of his driving license? A. Yes.

Q. That's a fairly simple process, isn't it, Mr. Carlson? A. Yes.

Q. They will furnish that to you for a dollar, is that right? A. In Oregon, yes.

Q. For detailed records of everything pertaining to the [116] driving record of that particular person? A. Yes.

Q. Now, Mr. Carlson, did you cancel out—no. I shouldn't say "you." Excuse me. But, Mayflower Insurance Exchange, did you cancel Mr. McKinzie after this accident for nonpayment of premiums? Do you recall that? A. That is correct.

Q. I am sorry. I didn't——

A. That is correct, yes.

Mr. Kennedy: Can you hear Mr. Carlson (speaking to jury)?

(At this point some of the jurors nodded their heads.)

Mr. Kennedy: Counsel, could I have those exhibits, please, pertaining to cancellation?

(At this point a document purporting to be an invoice from Mayflower Insurance Ex-

(Testimony of Ray T. Carlson.)

change to Arthur A. McKinzie was marked for identification as Defendants' Exhibit 1; a document purporting to be a letter dated June 28, 1957, from Mayflower Insurance Exchange to Mr. McKinzie, was marked for identification as Defendants' Exhibit 2.)

Q. (By Mr. Kennedy): Mr. Carlson, I have handed you Defendants' Exhibit 1 marked for identification, which [117] purports to be a billing addressed to Mr. McKinzie which advises him that his policy will be cancelled after June 14th, 1957, which was after the date of this accident. Is that the billing that your company forwarded to Mr. McKinzie? A. Yes.

Q. And it advises him of that fact, does it not?

A. Yes.

Q. Now, would you tell us what Defendants' Exhibit No. 2 is?

A. This is a letter sent out after the cancellation.

Q. Addressed to Mr. McKinzie?

A. Addressed to Mr. McKinzie, telling him that we have noted that this policy has been cancelled for one reason or another. It says that "We lost you as a policyholder," and explains how a policy could be reinstated.

This is a form letter sent out to all policyholders that are—drop their policy for any reason.

Mr. Kennedy: Defendant will offer Defendants' Exhibits Nos. 1 and 2, your Honor.

The Court: Any objection?

(Testimony of Ray T. Carlson.)

Mr. Bosch: No objection.

(The invoice and letter having been previously marked for identification were received in evidence as Defendants' Exhibits 1 and 2.)

The Witness: May I make a correction there?

Mr. Kennedy: Yes.

The Witness: This is sent out in cases where there has been a cancellation for a nonpayment.

Q. (By Mr. Kennedy): Now, all of this procedure took place after this automobile accident of June 8th, 1957, did it not?

A. No. One did and one was sent out before the accident.

Q. The billing was sent out——

A. The billing was sent out on June 4.

Q. It advised him that his insurance would be cancelled on what date? A. June 14th.

Q. For what reason? A. For nonpayment.

Q. June 14th was after the date of the accident we are involved in, was it not?

A. I understand the accident date was June 8th.

The Court: May I interrupt, Mr. Kennedy?

Mr. Kennedy: Yes.

The Court: You referred to these as Defendants' Exhibits 1 and 2 and I noticed you had reserved those numbers for the depositions of McKinzie and Dorris, respectively.

Mr. Kennedy: I am sorry, your Honor.

The Court: Can we put them——

Mr. Kennedy: I didn't know that we were fol-

(Testimony of Ray T. Carlson.)

lowing the [119] order set forth in the pre-trial order.

The Court: So let's redesignate them 21 and 22.

(At this point the redesignation was made by the Clerk, redesignating the document marked Defendants' Exhibit 1 as Defendants' Exhibit 21, and redesignating the document marked Defendants' Exhibit 2 as Defendants' Exhibit 22.)

The Court: The two documents first identified as Defendants' Exhibits 1 and 2 are remarked as 21 and 22, respectively, and are received.

Mr. Kennedy: I would like at this time to read this Defendants' Exhibit No. 22 in evidence, your Honor.

It's entitled "Mayflower Insurance Exchange, 2717 Third Avenue, Seattle, Washington. Home Office. Main 4911." Date "June 28, 1957." Directed to "Arthur A. McKinzie, 4619 S.W. View Point Terr., Portland, Oregon."

The number for the policy is "174380." A blank for "Premium due for a full new term $59.14." Addressed to

"Dear Mr. McKinzie: Have we lost you as a policyholder?

Your auto insurance is not in force because the premium had not been paid prior to the cancellation date. You can put your Mayflower policy in force [120] by paying the premium for a full new term or on convenient terms as explained on the notice enclosed.

(Testimony of Ray T. Carlson.)

Mayflower continues to save you money without cutting protection or service. Driving your car without insurance is dangerous. Won't you take an important minute now to mail your remittance?

Very truly yours, Mayflower Insurance Exchange."

Down below is printed the designation "As Sound as the Name Is Traditional."

Q. Now, Mr. Carlson, did you have any communication with the Motor Vehicle Department of the State of Oregon after this particular accident?

A. Yes.

Q. And would you state generally the nature of that?

Mr. Bosch: May it please the Court—if I may interrupt a moment, your Honor, as I understand this course of investigation here seeks to develop facts which more properly lie in defendants' case in chief as to whether or not there was an estoppel, waiver, or whatnot.

The Court: Yes.

Mr. Bosch: I think it might be more properly developed in defendants' case in chief.

The Court: Let me have the question.

(At this point Mr. Kennedy's last question to the witness was read by the Court Reporter.)

The Court: That goes beyond the cross examination. [121]

Mr. Kennedy: Did I understand that Mr. Carlson will be available?

Mr. Bosch: He will be available at your pleasure.

(Testimony of Ray T. Carlson.)

Q. (By Mr. Kennedy): Now, Mr. Carlson, on your direct examination you have discussed what are acceptable and what are not acceptable risks. I assume that acceptable and not acceptable risks are set forth in your manual; is that correct?

A. Yes.

Q. Is that correct?

A. Basically, yes. There are certain unacceptable risks that might not be in the manual.

Q. In some cases you will insure someone even though he might be described as not acceptable in your manual; is that correct?

A. It would be an exception and it would not be on a bound application. It would be—it would have to be a case that was submitted on what is termed "on approval."

Q. You also take applicants under what is known as the assigned risk pool, do you not?

A. Yes.

Q. That's where the companies rotate on taking applicants where the company will not afford them insurance; is that correct?

A. Generally speaking, that is correct. [122]

The Court: For the benefit of the jury, isn't that specialized type of coverage?

Mr. Kennedy: I'm sorry, your Honor.

The Court: For the benefit of the jury, you have used the words "assigned risks" which is purely a trade term within the underwriting and insurance business. Is not that a specialized type of risk?

(Testimony of Ray T. Carlson.)

Mr. Kennedy: Yes, it is, your Honor. As I understand it—maybe you ought to have Mr. Carlson explain the term.

Q. Could you explain the term "assigned risk"?

The Court: Just a moment.

Mr. Bosch: I think we are getting into something that is clearly far afield and particularly irrelevent to this particular policy. This has nothing to do with the assigned risk and I don't think it is germane or pertinent to the jury or of any help to the jury.

The Court: The only reason I made that comment is he said, "You do share in assigned risks?" Now that's beyond the scope of our investigation but, on the other hand, the jury is entitled to know what counsel meant by that. That's the only purpose of it. And as long as the jury understands and counsel concedes that "assigned risk" is not an issue in this case and that it is purely a specialized type of coverage——

Mr. Kennedy: That is correct. [123]

The Court: Very well. As long as the jury understands that.

Q. (By Mr. Kennedy): Now, Mr. Carlson, you have stated in connection with the hypothetical question given to you by Mr. Bosch wherein he assumes certain facts that you would not have issued a policy of insurance to Mr. McKinzie. I would like to add to the hypothetical. Would it make any difference in your opinion whether Mr. McKinzie was eligible for a driver's license in the

(Testimony of Ray T. Carlson.)

State of Oregon at the time of the application? Would that have made any difference in your determination?

A. You mean based on his record as we know it now?

Q. Well, based on the assumptions that counsel gave to you before with the added assumption that he was eligible for an Oregon driver's license at the time the application was made out, would that have any bearing on whether he would be acceptable as a risk or not?

A. It would have no bearing.

Q. It would have no bearing? A. No.

Q. Would it change your answer or have any bearing on whether he was acceptable for a risk if he had a California driver's license at that time?

A. This is still on the basis he had a revocation in Oregon?

Q. That is correct. [124]

A. It would not have changed the decision, no.

Q. Did the fact that there was a violation for driving the truck with a faulty muffler—would that have any bearing on your underwriting determination?

A. Along with other citations, it would. By itself, no. Very little.

Q. It's a rather minor thing as far as underwriting is concerned?

A. By itself as a single citation, yes.

Mr. Kennedy: That's all, Mr. Carlson.

The Court: Any redirect?

(Testimony of Ray T. Carlson.)

Mr. Bosch: No further redirect, your Honor.

The Court: That is all, sir. You may step down. You heard counsel for your company say that you would hold yourself amenable?

The Witness: Yes, your Honor.

(Witness excused.)

Mr. Bosch: At this time, your Honor, we would like to offer into evidence what has been marked for identification as Plaintiff's Exhibits 8 and 9.

The Court: Any objection?

Mr. Kennedy: No objection, your Honor.

The Court: They will be received.

(At this point a letter dated September 23, 1957, from Mayflower Insurance Exchange to [125] Arthur Allen McKinzie was marked for identification Plaintiff's Exhibit 8, and a check dated 9-18-57 from Mayflower Insurance Exchange to Arthur A. McKinzie was marked Plaintiff's Exhibit 9.)

Mr. Bosch: Your Honor, I think at one stage earlier I moved for the admission into evidence of the defendant Gilmont's original answer and I—and as I recall the Court reserved judgment on that. I think it was marked.

The Court: It is on here as 21.

Mr. Kennedy: We still have an objection to it, your Honor. There has been an amended and supplemental answer filed.

The Court: May I see it, please? I don't find

any verification or subscription to the document by the defendants.

Mr. Kennedy: Your Honor, I would be willing to stipulate with counsel that it go into evidence as long as the amended and supplemental answer could go in also.

The Court: Well, I think that's part of your case in chief. That would be, I take it, by way of explanation.

Mr. Bosch: May I see the original for a moment, your Honor?

The Court: Yes, indeed you may.

Mr. Bosch: Your Honor, I appreciate that this particular document is not verified by the defendants Gilmont, which is ordinary in our state practice. However, the agents acting [126] as the representatives for that client made, by that treaty, certain admissions against interest. That is what it is offered for.

The Court: Well, frankly, I just don't know what the sanctity of the——

Mr. Bosch: Well, your Honor, perhaps if I can explain to the Court my sole reason for it—in the original answer the defendants Gilmont admitted that the company issued a policy in reliance upon and were induced by the application. In other words, they admitted that allegation which was made by the plaintiffs in our original complaint. In their answer they admitted that was a fact.

Mr. Kennedy: In——

The Court: Are you in a position to stipulate

at this time that—it is Mr. Pihl, isn't it—Mr. Pihl's signature?

Mr. Pihl: Mr. Pihl, your Honor.

The Court: And Crum, Walker & Buss. Are the defendants Gilmont in a position to stipulate that at the time this answer was filed in this cause bearing the signature of—is it Folger?

Mr. Pihl: Holger.

The Court: ——M. Pihl, Jr. of the firm of Crum, Walker & Buss that these attorneys were authorized by the defendants to prepare and file this pleading?

Mr. Kennedy: Oh, I don't think there is any [127] question about that, your Honor. Certainly they were authorized.

The Court: Very well. With that in the record it will be received for the purpose as stated by counsel.

(The document entitled Answer, having been previously marked for identification, was received in evidence as Plaintiff's Exhibit 21.)

Mr. Kennedy: May I at this time, your Honor, offer defendants' amended and supplemental answers?

Mr. Bosch: That's a matter for the defense.

The Court: That's a matter of your case in chief.

Mr. Kennedy: Very well.

Br. Bosch: Plaintiff rests, your Honor.

The Court: Defendants' first witness.

Mr. Kennedy: Defendant will call Mr. Dorris. We are calling him as an adverse witness. [128]

DONALD EUGENE DORRIS

produced as an adverse witness in behalf of the Defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Kennedy): Mr. Dorris, will you state your occupation, please?

A. Insurance adjuster.

Q. By whom are you employed?

A. Mayflower Insurance Exchange.

Q. As an adjuster? A. As an adjuster.

Q. And who is your immediate superior?

A. Mr. Mel Costa.

Q. Now, Mr. Dorris, did you have occasion to investigate the automobile accident between automobiles being operated by Mr. McKinzie and Mr. Gilmont? A. Yes, I did.

Mr. Bosch: May it please the Court, at this point plaintiff would like to interpose an objection to the development of this testimony on a number of grounds. First is this: that so far as plaintiff is concerned defendant has made no contention, set up no defense, which states a good cause of defense in this particular case. The grounds upon which—and I am anticipating what the evidence is going to be here—but I suspect that they will attempt to [129] develop by this witness various defenses based upon estoppel, waiver, laches. And in each instance, your Honor, each one of those elements as a good defense requires a pleading and a proof of prejudice and damage to the defendants Gilmont which has

(Testimony of Eugene Dorris.)
neither been pleaded nor can it be proved in this particular case.

There is no allegation in the contentions, the answer, supplemental answer, pre-trial order, of any contentions or allegations covering the matter of prejudice to these particular defendants or to the defendants Gilmont.

The Court: I think I see your point.

Members of the jury, the Court has arrived at a place where it has got to cross the bridge of determination of several legal problems that will develop, of course, in the remainder of the trial. And there will be considerable discussion among counsel with the Court concerning evidence, and that sort of thing. Now, please make yourselves comfortable up in the jury room while we are in discussion here.

(At this point the jury left the courtroom and the following proceedings were had out of the presence of the jury:)

The Court: You may step down, sir.

(At this point the witness left the witness stand.)

The Court: Now, I would anticipate, and counsel can [130] correct me if I am wrong, that we are now going into the investigation and the adjustment of part of the claim arising under issue No. 6.

Mr. Kennedy: Your Honor, what we intend to prove by this witness is that he had knowledge or had reason to know or was placed upon notice of

certain facts wherein as a reasonable man he should have known or actually knew immediately after this accident of June 8th, 1957, that Mr. McKinzie did not have a driver's license in the State of Oregon; that he was placed on notice that at that time an immediate investigation should be made, which he did not do. We further intend to prove by this witness that he talked to police officers in Newport immediately following the accident. That I don't know—I think in his deposition he testified that he was not aware of the contents in the Oregon State Police report but "I am advised that the contents of the police report state he did not have a driver's license"; that thereafter, I would say approximately the first part of July, he contacted either a landlady or a neighbor of Mr. McKinzie and at that time he received information which would indicate that Mr. McKinzie was a person of, possibly, bad moral character. He at that time, then, I believe, contacted or discussed the matter with the claims manager for Mayflower who is in the courtroom, Mr. Costa, and it was decided at that time that they would then [131] apply for—apply for an abstract of the driver's record of Mr. McKinzie from the State of Oregon.

Now, this all started with the first part of July. There will be testimony that quite a few letters were written to wrong places, dollars were not enclosed for the abstract of the driving records; that inquiries went to Seattle and back down to Portland. To make a long story short, it wasn't until September until they received the abstract. The first part

of July until September. Used no diligence at all, I mean, to obtain it.

In addition, during that period of time he contacted Mr. McKinzie at the Veterans Hospital here in Portland, took a statement from Mr. McKinzie. At that time he either was advised of the facts concerning the driving record or he should have been.

Thereafter he took a release and proof of loss from Mr. McKinzie. He paid the property damages under the insurance policy to City Finance and to Mr. McKinzie.

The Court: I suppose McKinzie had a fifty-dollar or a hundred-dollar deductible?

Mr. Kennedy: I am not certain.

Mr. Bosch: Fifty, your Honor.

Th Court: Well, property damage to McKinzie.

Mr. Kennedy: Let me finish, counsel.

Mr. Bosch: I think the Court, from the remark, has a [132] mistaken——

The Court: Well, I——

Mr. Bosch: All right. I won't interrupt again. I will make my——

The Court: I will make it clear to counsel. When you said property damage I thought you had reference to McKinzie's car.

Mr. Kennedy: I do have reference to McKinzie's car. But I think almost all of the interest in the car belonged to the finance company.

The Court: I would assume so.

Mr. Kennedy: And a check was made payable to both of them. Then the company received a notice or received the abstract of driving record, I

believe, on approximately December 3rd. The actual letter of rescission was not written to McKinzie until, I believe it was, September 23rd. The lawsuit was not commenced until, I believe it was, the first of October. I am not certain. The entire procedure in this particular case going from June 8th up until about October 1st showed a—first, a complete lack of due care in investigating the accident at all. It further showed that they had—that they had reason to know as a reasonable person that there was something wrong with the driving record of Mr. McKinzie early in the investigation. And I have cited authorities to the Court in the memorandum of law with respect [133] to that.

It shows unreasonable delay, laches, negligence, and certainly shows an affirmation or an estoppel under their insurance policy. And I particularly call to the Court's attention the Ninth Circuit Court case of Massachusetts Bonding & Insurance Company vs. Anderegg, 83 Fed. (2d). I might further state for the record, your Honor, that this particular matter here with respect to the testimony of the actual person who adjusted this loss, if defendants Gilmont are not permitted to introduce this testimony, it in effect removes all of the affirmative defenses of defendants Gilmont from the pre-trial order.

The Court: Thank you. Well, you say that you have cited authority to the effect that if the insurance company pays a mortgagee that constitutes a waiver to the mortgagor.

Mr. Kennedy: No, I didn't mean that, your

Honor. I think the fact of paying—the fact of taking the release and proof of loss, makes the check payable to both the mortgagor and to the insured, is just one act in the acts and conduct which constituted waiver and estoppel.

The Court: How did that affect these plaintiffs?

Mr. Kennedy: You mean Mr. and Mrs. Gilmont?

The Court: I beg your pardon. Now, the defendants Gilmont.

Mr. Kennedy: Well, your Honor, it will also go into the [134] question of the negotiations with the attorneys for Mr. and Mrs. Gilmont. The matter was delayed up until October. If the lawsuit had been filed initially I think that there would definitely have been an appearance at that time. And also I think they are entitled to rely on any particular defense that Mr. McKinzie might have.

They come into court here and say, "We stand in the same shoes as Mr. McKinzie. Well, then, we ought to be able to have the same benefits, also." Now, it is certainly perjudicial to Mr. McKinzie.

The Court: I take it they are defending under reservation.

Mr. Bosch: That's correct, your Honor. But it's not proper for us to introduce at this time what we have available. May I ask——

The Court: I will hear you.

Mr. Bosch: Now?

The Court: I just wanted to get these questions.

Mr. Kennedy: The case I had reference to, your

Honor, was—within the memorandum was Points & Authorities No. 8.

The Court: Points & Authorities No. 8?

Mr. Kennedy: And what I had reference to is that it isn't necessary to actually prove that a person had actual knowledge. It is more or less incapable of proof in some cases. But the standard required is that of a reasonable, [135] prudent person.

The Court: I agree with you. Extending this principle a little further, it goes to what is material and what is not material.

Mr. Kennedy: Well, that's correct, your Honor.

The Court: That's what it amounts to. Putting it this way, the underwriter must act reasonably in connection with the usual, reasonable standard in determining in his own mind whether or not a representation is material to the risk such as the witness said, a citation for driving without a muffler in and of itself would not be material to the risk. That is based upon reason.

All right, Mr. Bosch. I will hear you.

Mr. Bosch: Your Honor, I quite agree with Mr. Kennedy that the defendants Gilmonts' rights and remedies in this particular case are derivative. They can be no better than Mr. McKinzie's.

Now, Mr. McKinzie got an insurance policy in this particular case at least, so far as the evidence we have before this Court is concerned, solely because he misrepresented to that company material facts as to his prior driving record and the fact that he had been suspended in the State of Oregon;

that he had no Oregon driver's license; hadn't had one for a number of years; had done drag racing, and whatnot. So there is no evidence except what we have [136] heard from the defendant McKinzie by his own admission. He concedes the fact that he has given false and material representations to the company. But for those false and misleading representations he never would have had a policy.

Now, the Gilmonts can have no greater rights than McKinzie does. Certainly the Gilmonts cannot take the benefit of McKinzie's fraudulent misrepresentations by asserting some kind of an estoppel when they cannot hope to plead and prove the very fundamental and necessary requirement of an estoppel, waiver, or laches. And that is that they have been prejudiced in some way by relying on something that the insurance company has done.

There is no pleading whatsoever by the Gilmonts that they have done anything in reliance upon what the insurance company, its adjusters, its investigators, its underwriters, or any of the rest of its agents have done. Their position is no better and no worse than it was immediately after the accident. The accident certainly didn't happen in reliance on the fact that McKinzie was going to have a ten-twenty automobile liability policy. In other words, they are no better or worse today than they were the day, unfortunately, that McKinzie struck them. That is not plaintiff's fault. Plaintiff has done nothing since then. Plaintiff conducted an ordinary investigation. In the course of that investigation plaintiff came across facts which caused us to request

a motor vehicle record from Salem. Then sometime afterwards in the early part of this year when we took the deposition of McKinzie we find out by his own admission that not only had he had a suspension of his license but he also had a record down there in California. We found that only because he indicated that he used to drive a car down in California and he had a license.

So, I wrote to California and asked them also to give us an abstract. That wasn't discovered by anybody investigating the original accident. He also told us that he had other insurance companies but he couldn't tell us who they were or whether they were cancelled, revoked, or what. There is nothing dilatory about anything that was done here, your Honor. And even assuming that it might be, nothing —even if it was dilatory or somewhat negligent there isn't any showing that it hurt anyone.

We owed no duty to anyone that we violated. Negligence infers a duty, or you look for the duty before you talk about negligence. There is no duty here to anyone. McKinzie has been in this jurisdiction since the day of the accident. He has been available for the defendants Gilmont and the rest of the members of their family to serve him with all kinds of processes in any lawsuit they want to bring. His assets are no better or worse than the day he hit them. He is here and he has all the remedies against McKinzie. [138] But certainly they have their reliance on what the insurance company had done or told them. There is no prejudice, your Honor. Certainly they shouldn't be able to take the

benefit of McKinzie's false representations. It would give to the Gilmonts a greater right under the contract than the original parties had.

Mr. Kennedy: Are you through, Mr. Bosch?

Your Honor, may I just add a few comments?

The Court: Yes, indeed you may.

Mr. Kennedy: I think Mr. Bosch's argument has pointed out the problem. It's a closing argument on the facts. This is a jury question. That's why we have a jury here to determine the particular facts. It is basic to the law of rescission that you have to act. It goes to their whole cause of action. You must act promptly and you cannot be in a position where you have been negligent or where you have affirmed the contract. It's just basic to your cause of action for rescission and that's all they have in this case is a cause of action to enforce the rescission that they set forth in their letter of September 23rd, 1958. And counsel's statement that we can't have any right to Mr. McKinzie, of course, runs counter to his trying to make us the only subject of his right. If we are going to be subject to them we ought to have, at least, his rights. And counsel ought to be ordered to prove a full cause of action. He can't do [139] it if he has been guilty of estoppel, waiver, laches. They are jury questions.

Mr. Bosch: Your Honor, I don't like to belabor the point to the point where the Court gets somewhat bored, but our case is primarily between two contracting parties, your Honor.

The Court: Yes.

Mr. Bosch: Certainly, the defendants Gilmont, if there is a policy here, have the benefit of it. But that is a secondary matter. They are in it now, your Honor, because of the declaratory judgment suit.

The Court: I would like to think not in the position of the Gilmonts, I would like to think that this action is between Mayflower Insurance Exchange and one McKinzie.

Mr. Bosch: Yes.

The Court: Now, McKinzie is not here defending himself but the Gilmonts defending in his shoes are here conducting his. Now, am I wrong on that on that concept?

Mr. Kennedy: Well, no. I don't think so, your Honor, because they are necessarily placed in that position. They are trying to protect the assets that they have in Mr. McKinzie's insurance policy.

The Court: Do they have any higher right than McKinzie's has?

Mr. Kennedy: I don't think so other than, possibly, the [140] negotiation with the attorneys for them and their forebearance and reliance on it. But they are generally pretty well in the same position.

The Court: I think so. Are you acquainted with Massachusetts Bonding against Anderegg?

Mr. Bosch: I am ashamed to admit, your Honor, that after being served with a copy of that I didn't read that particular case.

The Court: I have taken the one from my library. But there is one downstairs. I want to orient myself with this.

Mr. Kennedy: There is also a considerable

amount of Oregon cases, your Honor, on rescission.

The Court: Oh, yes. I'd say the woods were full of them. Do you want to add anything, having read the case?

Mr. Bosch: Well, your Honor, of course you always start out distinguishing a case on its facts. But obviously there we had, after the Court found what was full knowledge upon the ground which they were entitled to rescind, then the company went on, had another accident, started investigating that, and asked for more premiums and accepted——

The Court: I think that would be an excellent argument for you to make after all the evidence is in.

Mr. Bosch: Your Honor, this is what—somewhat a unique case to defend or to try to defend.

The Court: Mr. Bosch, I am satisfied about it. Now, I [141] think that this Massachusetts Bonding Company vs. Anderegg has plotted the course for us. And it comes from this district. It is cited by the Ninth Circuit. And, certiorari was denied. Now, the factual situation in that case at the beginning of it is, of course, the suit by the insured, an action between the insurer and the insured. And I am satisfied that unless there were some subsequent actions on the part of plaintiff in this case that worked to the prejudice of the defendants Gilmont, that they stand in the shoes of the defendant McKinzie, gaining no higher or no lower right than McKinzie had.

Now, first of all, Massachusetts against Anderegg establishes for us the proposition that this is a

proper suit on behalf of the plaintiff because this plaintiff would not have an adequate remedy at law on the one hand against the defendant in the state court cases on the grounds of fraud as pointed out.

Now, while it is true that a suit for declaratory judgment is not necessarily in action—or a suit in equity, it was primarily an equitable matter. But as the rules have been amended to provide, if there are legal questions such as fraud, as claimed here, that is a legal matter and the parties are entitled to a jury.

Now, here is the question: "Was the suit barred by—" we are talking about Massachusetts—"Was the suit barred by laches? One who has been induced by fraud to enter [142] into a contract must, on discovering the fraud, choose at once whether he will rescind the contract or affirm it. If he chooses to rescind, he must announce his purpose at once, and adhere to it. He is not permitted to play fast and loose. He must speak and act promptly. Silence constitutes a waiver of the right to rescind. Delay and vacillation are fatal.

Appellant's conduct did not meet the requirements laid down by these authorities. Appellant did not, on discovering the fraud here complained of, announce its purpose to rescind the policy. On the contrary, with full knowledge of the fraud, it demanded the payment of additional premiums. After discovering the fraud, it waited more than a month before announcing its purpose to rescind,

and waited two weeks longer before commencing this suit," a period of time of six weeks.

"Meanwhile, and before appellant had announced such purpose, there had been a second accident involving an automobile covered by the policy, thus materially changing the situation of the parties. In view of this change and of all the circumstances here shown, we hold that appellant was guilty of laches whereby its suit to rescind the policy was and is barred."

Bear in mind, a material changing of the position of the parties. It's Hornbook law that the principle is fundamental to the doctrine of laches which is defined as [143] "Such negligence or omission to assert a right as taken in conjunction with the lapse of time more or less great and other circumstances causing prejudice to an adverse party operates as a bar in a court of equity. So, even in a court of law although an equitable affirmative defense is asserted," citing from one of the Oregon cases which is binding upon this diversity suit, "mere lapse of time does not of itself constitute laches although long delay can be certainly claimed as an important element of laches. Mere delay will not ordinarily bar relief where it has not worked injury, prejudice, or disadvantage, to the defendant or others adversely interested."

So, there are your basic elements of laches, a lapse of time, more or less in asserting a right. The Court of Appeals for the Ninth Circuit says "Act immediately." And the second element is a material

change of situation or position of the parties which works to a prejudice of the parties.

Now, I have no way of anticipating what the evidence of the defendants in this case under their affirmative defense of laches will show. But it must show that after having knowledge of the false—the claim of false representations that there was a lapse of time more or less and that these defendants were prejudiced by reason of the nonaction during that lapse of time, if any, by the plaintiff. So, I think [144] that inquiry along the line that has been started is pertinent and material to the one asseration of the defendants: "Has plaintiff been guilty of laches?" Certainly it doesn't apply as to VI: "Was plaintiff careless or negligent in investigating said automobile accident. . . .?" That has nothing to be brought out. I am satisfied that it would not be pertinent or material under VII: A claimed waiver, nor does it tend to show any estoppel. But I can see where it might tend to be material under laches.

Mr. Kennedy: May we have a brief recess, your Honor, before going on?

The Court: Well, I notice Mr. Bosch is unhappy and wants to say something.

Mr. Bosch: No. I just wanted to clarify my—I don't mean—to clarify my own thinking, your Honor, Unless I have missed something completely there is nothing in our pleading, our pre-trail order, nothing that's been developed that I can expect that will in any way establish or is intended to show on behalf of these defendants or McKinzie any preju-

dice, any material change of position. There is no pleading——

Mr. Kennedy: Well, your Honor, I think we are going to have to wait until the evidence is in. If we haven't proved it, then, of course, the Court is going to have to instruct the jury that it isn't there. What Mr. Bosch is trying to [145] do is to prevent us from putting on any case on his understanding of what evidence we are going to put on. So we would have to hear the evidence first.

Mr. Vosburg: There is one other further point, your Honor. Maybe I am speaking out of order. Is the defense by Gilmonts themselves, while they are derivative from McKinzie, permissible where the contracting party himself has not contested the action brought by the plaintiff?

The Court: I think so.

Mr. Vosburg: That's just the point, that I would think that they would not, your Honor.

Mr. Kennedy: They sued Mr. and Mrs. Gilmont and all their children. They must have some rights here.

The Court: Contention of defendants Gilmont III: These defendants contend that the "plaintiff received notice and knowledge of said accident immediately following said collision and thereafter investigated the facts and circumstances involved in said collision and defendants Gilmont are informed and believe and therefore allege that at said time the plaintiff knew, or in the exercise of reasonable care, should have known, that defendant Arthur Allen McKenzie was operating his automobile with-

out a valid driver's license from the State of Oregon."

Now, I believe counsel can correct me, but I believe that the notification that the insurance would be cancelled [146] unless a certain balance of premium was paid was after the suit was instituted.

Mr. Bosch: It was mailed before the accident and was to be effective about seven days following the accident. There is no policy defense on the failure of premium.

The Court: No. I understand that. There is one possibility that V would tend to go to the asserted issue of laches only.

Mr. Bosch: On the payment under collision feature of the policy, your Honor?

The Court: Yes.

Mr. Bosch: I am prepared to argue that and submit cases right on point, your Honor.

The Court: On the question of laches?

Mr. Bosch: No whether it's an estoppel and waiver.

The Court: I agree with you.

Mr. Kennedy: Let's get the testimony in, Mr. Bosch, and then we will argue these questions.

Mr. Bosch: Even then, your Honor, I still don't see in that allegation any pleading as to materially changing position to prejudice.

The Court: Yes. I agree with you.

Mr. Bosch: I don't see in the pleadings——

The Court: But, on the other hand you subscribed to a pre-trial order that sets an issue

up: "Has plaintiff been [147] guilty of laches?" You subscribed to that very issue.

Mr. Bosch: Your Honor, I can't deny that the defendant has the right to put up his defenses and issues in this, but it's a matter of fact supporting it.

The Court: You certainly can. You can apply to the Court.

Mr. Kennedy: Is it your position you don't want us to put on any facts? You want the Court to decide it without any facts?

The Court: Yes. I think I will adhere to the rule on it.

Mr. Kennedy: May we have a brief recess, your Honor?

The Court: Now, I want to make it certain—and I will have to screen this testimony as it begins to come along—that this goes only to the issue of laches. And, further, I will ask counsel, is it your representation in the record to counsel and the Court that you will offer evidence which you conscientiously claim tends to prove prejudice to these parties?

Mr. Kennedy: Yes, your Honor, either derivative of Mr. McKinzie or themselves. I might ask your Honor, I, of course, for the record feel that we have an affirmative defense of negligence in this cause of action for rescission. Do I understand that the Court is now then ruling as a matter of law that we do not have a defense of negligence as an affirmative defense of their cause of action for rescission? [148]

The Court: For rescission, yes. You are cor-

rect. But not on the basis of their original action. I will subscribe to your theory that the jury must find that they acted reasonably in connection with their claimed false representations material to the——

Mr. Kennedy: I understand the Court at this time is withdrawing the question of waiver.

The Court: Correct.

Mr. Kennedy: And I understand that at this time the Court is withdrawing the question of estoppel.

The Court: Correct.

Mr. Kennedy: And that the Court is withdrawing the question of whether plaintiff had affirmed the contract of insurance with Mr. McKinzie by its acts and conduct.

The Court: Wouldn't that be a question of laches?

Mr. Kennedy: Well, it's not necessarily. I think it's basic to the question of the right to rescind, your Honor.

The Court: Well, I think we are talking about the same thing. The right to rescind, if there was a material false representation, is a right. Now they waive that by being guilty of laches acting to the prejudice of the other adverse party.

Mr. Kennedy: Or it's basic, as I understand it, to the cause of action, your Honor, that you—the cases do not even speak of the magic term "laches." They say that you [149] must act promptly. If you do not you affirm the contract and you're not entitled to rescind.

The Court: Right.

Mr. Kennedy: Because in this particular case, your Honor, being a contract, the Mayflower Insurance Exchange had the right when they discovered it or when they should have discovered it to either rescind or to affirm the contract. They could affirm the contract and they could sue Mr. McKinzie for damages.

The Court: Yes.

Mr. Kennedy: They had those two rights. What we are saying here, your Honor, is by their acts and conduct they affirmed that particular contract of insurance and the right that was left to them was the right that they have to sue Mr. McKinzie for damages.

The Court: I don't know if we are involved in semantics or not, but you claim they followed the course and conduct——

Mr. Kennedy: That's correct, your Honor.

The Court: ——after they knew the falsity of the representations?

Mr. Kennedy: Or should have known.

The Court: Right. Now, you say because they didn't act promptly they affirmed the contract.

Mr. Kennedy: With that knowledge or with the reason——

The Court: And the reason that you say that they affirmed [150] that contract—they didn't do it manifestly or assertedly, they impliedly did it in law—impliedly in law because they are guilty of laches.

Mr. Kennedy: Well, that may be possibly what I am saying, your Honor. It is hard for me to, without putting on the testimony——

The Court: You certainly don't claim that they took any affirmative action in affirming this contract after they knew or should have known of the falsity——

Mr. Kennedy: Oh, yes, I do, your Honor. It's our position here that their affirmative conduct—and it was by their acts and conduct as a legal principle that they affirmed the contract. In other words, with knowing or——

The Court: Well, then, why do you set up the affirmative defense of laches?

Mr. Kennedy: Because it's a separate——

The Court: A separate defense. Well, it doesn't make any particular defense because it would be the same conduct that would make them guilty of laches that would be an implied or an affirmative contract. It would have to be the same conduct. So it doesn't make any difference. We can determine it at a later time which one of those legal propositions you claim should be submitted, if any.

Mr. Kennedy: Very well, your Honor.

The Court: We will take a short recess. [151]

(Recess taken.)

(The following proceedings were had out of the presence of the jury:)

The Court: May I ask of counsel, what is the status of the record in connection with the plaintiff and the defendant McKinzie: Has there been an order of default taken?

Mr. Bosch: No, your Honor.

The Court: Now, the Court made the statement while we were discussing here off the shoulder that it would seem that the defendants Gilmont were in the shoes of the defendant McKinzie. With a little reflection I see that that might tend to be taken by counsel as an indication that the Court feels that there is some type of contractual interest or, better still, privity existing between defendant McKinzie on the one hand and the defendants Gilmont on the other, which I don't find. My mind is open as to whether or not the defendants Gilmont can conduct a defense for and on behalf of McKinzie.

Mr. Vosburg: That was the point I attempted to make, your Honor, and I find no cases that would allow them, where he concedes everything, to assert some kind of a defense or some kind of an estoppel.

The Court: Well, do you find any that they can?

Mr. Vosburg: In all cases; at least, to my knowledge, [152] your Honor, they have always been the —the assured person is the one that's coming in here waving the flag. I don't see how these people have any rights.

Mr. Kennedy: Well, your Honor, I might say this: Of course, the defendants Gilmont certainly have rights as creditors or possible creditors in to the insurance policy.

The Court: Possible creditors, yes.

Mr. Kennedy: That's right. But that's the very reason that the insurance company joined all the defendants Gilmont.

The Court: Supposing they don't get a judgment?

Mr. Kennedy: If they don't get a judgment the question is moot.

The Court: Now, we have a statute here in Oregon that provides that the judgment creditor may directly levy against the indemnitor of the judgment debtor. But does that create any legal relationship between them prior to a judgment? Do I take it that the plaintiff is in a position to ask for a default against the defendant McKinzie?

Mr. Vosburg: We ask for relief, your Honor. We were frankly going to be guided by the wishes of your Honor. It's a problem that we haven't determined yet. And we are a little uncertain of it.

The Court: There has been no appearance on behalf of defendant McKinzie?

Mr. Vosburg: That's correct, your Honor. [153]

The Court: Well, I guess we had better get down the books.

Mr. Kennedy: I might ask counsel what was the purpose of them joining the defendants Gilmont in this proceedings. They are either going to be bound or they aren't. If they are not part of this proceedings then we are going to have another lawsuit. But if they are going to be bound they certainly have a right to conduct their defense.

The Court: Supposing this: Supposing they had not joined you——

Mr. Kennedy: Then it wouldn't be res judicata for them, your Honor.

The Court: ——and you people wanted to inter-

vene. Now, it certainly would be res judicata if there is privity between you.

Mr. Kennedy: There is no privity between——

The Court: All right. Then what is your standing in court?

Mr. Kennedy: Well, the standing is this, your Honor: We are made defendants and the plaintiff has asked the Court to declare the rights of the defendants Gilmont along with their rights. Now if we are not properly in court then we are not bound by this proceeding. If we are properly——

The Court: Ordinarily when a defendant is haled into court and he feels he is not a proper party he moves to get [154] out.

Mr. Kennedy: We join in the declaration. We have asked in our—asked in our contentions that they declare the rights.

The Court: As I take it, under the pre-trial order there is no contention on the part of the plaintiff—now, the relief that they are asking the defendants Gilmont is that they be restrained from instituting any legal proceedings against plaintiff for the recovery of the amount of any judgment that the defendants or any of them might hereafter obtain against defendant McKinzie. In other words, the relief that they are asking against the defendants Gilmont that they be enjoined from taking advantage of the Oregon statute in the event they get a judgment.

Mr. Kennedy: I might also refer——

The Court: Yes.

Mr. Kennedy: Excuse me, your Honor. I might

also refer—I find that I do have some authorities on that.

The Court: Thank you. I would be pleased to have them.

Mr. Kennedy: 142 Federal Supplement, 862. I believe that the following two cases also have some applicability to this question, although I am not positive. 157 Federal (2d) 653, and 173 Federal (2d) 924. These were casual notes. I am not exactly positive what these cases hold.

The Court: Well, let's take a look at them. I don't [155] suppose counsel for the plaintiff has had an opportunity to examine these.

Mr. Vosburg: We have not, your Honor.

Mr. Bosch: With Mr. Price's assistance we may soon.

The Court: Well, if you have it before you I suggest you take a look at 157 Federal Reporter.

Mr. Vosburg: 653?

The Court: At Page 658, keynote 10 and 11. Read those and then you can go back to the factual situation. I submit to counsel for the defendants Gilmont that 142 Federal Supplement, Farmers Underwriters against Fales has no application to this case because it appears therein that there had been a judgment entered in the state court.

Mr. Vosburg: Also, it is an absolute liability statute there, your Honor.

The Court: So that has no application.

Mr. Kennedy: As I explained, your Honor, these were casual notes as I went through and I have not had an opportunity——

The Court: I am not saying that you misquoted these.

Here is a case that will be of interest to counsel. It is a United States Supreme Court case, a liability insurer's complaint for declaratory judgment that it was not liable on the policy nor obligated to defend an automobile collision case pending in the state court against the insured presented [156] an "actual controversy." Not only was he insured but also was the injured person who had a statutory right to proceed against the insurer if the insured failed to satisfy a final judgment within thirty days. Now, of course, that doesn't point out to us whether or not that suit was brought after the judgment, but I would be inclined that it must have been brought before the judgment.

Mr. Vosburg: Well, I just wondered here, your Honor, see, here at the state of the record you make a judgment stating we have no obligations to defend Mr. McKinzie in this suit, but then on the other hand you refuse to enjoin them from collecting any judgment that might be rendered against you. In some way you are going to be in the position—the position they take, you are going to get absolute inconsistencies, which is my theory, which is by itself impossible and improper.

The Court: Well, as I say, our question, boiling it down, is may these defendants Gilmont appear for and prosecute any defense that defendant McKinzie has. That is what it amounts to. Now, I have a District Court opinion to bolster my position. It is what I originally was thinking about, and that is

that these defendants Gilmont are proper parties but they are not necessarily indispensable parties. Now, you elected to bring them here and they are before the Court and they are asserting this position. Now you could have ignored [157] them and brought your action solely against McKinzie and they would have been bound by it. However, there is one case here that says that is not res judicata.

Mr. Vosburg: Your Honor, I appreciate when we filed a lawsuit we didn't anticipate or know that McKinzie was going to concede that he had made these representations. So we thought them not necessary but, at least, proper parties.

The Court: Well, they are here.

Mr. Vosburg: But McKinzie is not.

The Court: There is the rub.

Mr. Bosch: Well, that's our whole question, what we do in a situation where we don't have our, call him, culprit McKinzie, or whatnot, and what the effect of a judgment against him is.

Mr. Kennedy: Your Honor, I just have one brief statement and I will sit down. It is impossible for me to see how anybody can be bound by any proceedings unless they are made party to it and have a right to put on their particular defense when they are not in privity. If they didn't join him it wouldn't be res judicata.

The Court: Well, I am satisfied that if the plaintiff in this case had not joined in the action the defendants Gilmont and proceeded alone against McKinzie with the status of the case so far as the plaintiff against McKinzie now is, they would be

entitled to their relief as they have prayed [158] for against McKinzie on default. But that would not be res judicata as to these people in their state suit and, therefore, it would be incumbent upon the plaintiff to assert their legal defense in that action.

Mr. Vosburg: We concede that.

The Court: Now, in order to avoid that — and, perhaps you did have one case, for example, coming from our own district that says that that does not necessarily give you an adequate remedy at law— therefore you have the right to bring this action which you did, and you have the right to name them as proper parties defendants. You hale them in. Now, do they have the right to assert the same defense here that they could if you had attacked them in the state court? That's the whole question in a nutshell.

I am sure that you would concede that you would have the right to appear in the state court and urge these defenses as you here urge against recovery on them and the voidance of the policy to relieve you of the execution of judgment.

Mr. Vosburg: That would be a right on our controversy between McKinzie and us and not on them.

The Court: They certainly could have asserted all of the defenses there that they are now asserting here.

Now, here is the situation in Maryland Casualty Company against Pacific Coal & Oil Company. It came up from [159] the Sixth Circuit to the Supreme Court.

"Petitioner issued a conventional liability policy to the insured, the Pacific Coal & Oil Company, in which it agreed to indemnify the insured for any sums the latter might be required to pay to third parties for injuries to person and property caused by automobiles hired by the insured. Petitioner also agreed that it would defend any action covered by the policy which was brought against the insured to recover damages for such injuries.

While the policy was in force, a collision occurred between an automobile driven by respondent Orteca and a truck driven by an employee of the insured. Orteca brought an action in an Ohio state court against the insured to recover damages resulting from injuries sustained in this collision. Apparently this action has not proceeded to judgment."

So there we find the same comparable situation we have here.

"Petitioner then brought this action against the insured and Orteca. Its complaint set forth the facts detailed above and further alleged that at the time of the collision the employee of the insured was driving a truck sold to him by the [160] insured on a conditional sales contract.

Petitioner claimed that this truck was not one 'hired by the insured' and hence that it was not liable to defend the action by Orteca against the insured or to indemnify the latter if Orteca prevailed. It sought a declaratory judgment to this effect against the insured and Orteca * * *"

Same situation here.

"* * * and a temporary injunction restraining the proceedings in the state court pending final judgment in this suit.

Orteca demurred to the complaint on the ground that it did not state a cause of action against him. The District Court sustained his demurrer and the Circuit Court of Appeals affirmed. We granted certiorari to resolve the conflict with the decisions of other Circuit Courts of Appeals cited in the note.

The question is whether petitioner's allegations are sufficient to entitle it to the declaratory relief prayed in its complaint. This raises the question whether there is an 'actual controversy' within the meaning of the Declaratory Judgment Act.

The difference between an abstract question and a 'controversy' contemplated by the Declaratory [161] Judgment Act is necessarily one of degree, and it would be difficult, if it would be impossible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all of the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.

It is immaterial that frequently, in the declaratory judgment suit, the positions of the parties in the conventional suit are reversed; the inquiry is the same in either case.

That the complaint in the instant case presents such a controversy is plain. Orteca is now seeking a judgment against the insured in an action which the latter claims is covered by the policy and sections "of the Ohio code give Orteca a statutory right to proceed against petitioner by supplemental process and action if he obtains a final judgment against the insured which the latter does not satisfy within thirty days after its rendition."

In effect, the same status as we have in Oregon.

"Moreover, Orteca may perform the conditions of the policy issued to the insured requiring notice of the accident, notice of suit, etc., in order to prevent lapse of the policy through failure of the insured to perform such conditions."

That's merely, now, a statutory provision giving the injured party a few more rights. In other words, he can pay premiums that become due and keep the policy from lapsing if that be a situation. But I don't see where that has any bearing in this case.

"It is clear that there is an actual controversy between petitioner and the insured. If we held contrariwise as to Orteca because, as to him, the controversy were yet too remote, it is possible that opposite interpretations of the policy might be announced by the federal and state courts. For the federal court, in a judgment not binding on Orteca might determine that petitioner was not obligated under the policy, while the state court, in a supple-

mental proceedings by Orteca against petitioner, might conclude otherwise.

Thus we hold that there is an actual controversy between petitioner and Orteca, and hence, that petitioner's complaint states a cause of action against the latter." [163]

Now, here would be the situation. The parties Gilmont are not indispensable parties to this proceeding but they are proper and that gave the plaintiff the option to bring them into this court and litigate the controversy, which the Supreme Court admits that they have between these parties, or seek this declaratory action here against the insured only to determine whether or not they had the obligation to go down there and defend that action under their policy. But, still that would not be res judicata to these parties Gilmont.

Therefore, the plaintiff would have to go to the state court, file its appearance by interpleader or intervention, and say, "No. These parties cannot recover because we have rescinded that contract and we anticipate that any judgment obtained herein under supplementary proceedings than these proceedings, they will levy against us. We want to be relieved of that possibility."

Now, you had your choice to litigate your matter here by bringing them in the controversy, which the Supreme Court says you have the right to do, or you have the choice to go to the state court. You elected to come to this court. Here you may litigate the controversy that you have with the defendants

Gilmont to the effect that they cannot seek supplementary proceedings in the event they obtain a judgment because you have no liability under the policy. That is the [164] course I will plot.

So here they may raise every defense that they could in the state court.

Do you want a little waiting spell before we continue?

Mr. Bosch: I would appreciate one.

The Court: By the way, Gentlemen, there is an expression in the close of that Supreme Court case on 270 which I am frank to say I don't know what the meaning of it is. You will recall they concluded:

"Thus we hold that there is an actual controversy between petitioner and Orteca, and hence, that petitioner's complaint states a cause of action against the latter. However, our decision does not authorize issuance of the injunction prayed by petitioner."

That has reference to the abatement or restraining of the proceedings of the state court as prohibited by Section 265 of the Judicial Code.

Mr. Vosburg: That would refer to without going against the assured he could still pursue his remedy against them, would be my interpretation, your Honor.

The Court: I just call that to your attention.

(Recess taken.) [165]

(At this point the jury entered the courtroom and the following proceedings were had in the presence of the jury:)

The Court: Call your witness.

(Testimony of Donald Eugene Dorris.)

Mr. Kennedy: I believe that Mr. Dorris was on the stand.

The Court: Very well.

(At this point Mr. Dorris resumed the witness stand.)

Mr. Kennedy: I would like to ask at this time, your Honor, that the deposition of Mr. Dorris be opened and published and made a part of the record.

The Court: Let the record show that there appears in the files of the cause a sealed envelope bearing the legend "Deposition of Donald Eugene Dorris," bearing this court clerk's stamp filed March 11th, '57. Will the Clerk please break the seal and remove the contents and mark the same for identification as Defendants' Exhibit 23?

(At this point a deposition of Donald Eugene Dorris taken February 21, 1958, was marked for identification as Defendants' Exhibit 23.)

Mr. Kennedy: May I proceed, your Honor?

The Court: You may.

Mr. Kennedy: Is there any objection to the deposition being published? [166]

The Court: Any objection?

Mr. Bosch: Oh. Excuse me, your Honor. No, your Honor.

The Court: It will be published and made a part of the record.

(At this point Defendants' Exhibit 23, previously marked for identification, was made a part of the record.)

(Testimony of Donald Eugene Dorris.)

Direct Examination—(Continued)

Q. (By Mr. Kennedy): Mr. Dorris, I believe we had just got to the point where you were an adjuster for Mayflower Insurance Exchange.

A. I believe that's correct.

Q. Is that correct? A. Yes.

Q. And I believe you testified that your immediate superior was the claims manager, Mr. Costa; is that correct? A. Yes.

Q. Mr. Costa is sitting in the back of the courtroom, is he not? A. That's right.

Q. Now, Mr. Dorris, when was this loss involving the automobile accident between Mr. McKenzie and Mr. Gilmont first assigned to you?

A. The actual date on that, I believe, was June the 14th.

Q. That was assigned to you by whom? [167]

A. Mr. Costa.

Q. What did you do after it was assigned to you?

A. Well, the first thing I did, as I recall — as near as my memory—as I can recall, I called Mr. Bucholz' office and talked with Mr. Bud Snyder over the phone.

Q. Excuse me. That's the Mr. Snyder who testified here?

A. Yes. That's right. And found out that there was a — that he didn't know where Mr. McKinzie was as far as where we could contact him. He could give me only the information that was given over

(Testimony of Donald Eugene Dorris.)

the phone to our claims clerk or the girl in the office that took the phone call.

Q. Well, did your company receive knowledge of this accident prior to June 14th?

A. I believe it came in on the 13th. That was taken by the girl on the 13th, I believe, over the phone.

Q. Do you know where that information came from?

A. As I understand, it came from Mr. Snyder.

Q. I see. Mr. Snyder first acquired the information? A. That's right.

Q. All right. Go ahead with your conversation with Mr. Snyder.

A. It was very brief. I found out that Mr. McKinzie had a loan on the car or there was a mortgage on the car. I secured that information and I attempted to locate the loan company and I managed after two or three telephone calls to [168] locate the proper office and got ahold of a—I don't recall now whether it was at that time that I got ahold of the assistant manager of someone in that capacity—Mr. Pemberton or Mr. Bemperton, I am not sure of the name—and I asked if he knew of any information that would be pertinent to how we could get ahold of Mr. McKinzie or members of his family.

Q. Excuse me, Mr. Dorris. Did you acquire any copy of the application on or about that time or any information regarding coverage?

A. Application? You are referring to what, sir?

(Testimony of Donald Eugene Dorris.)

Q. To Mr. McKinzie's application for insurance.

A. No, sir.

Q. Did you acquire any information regarding coverage under the insurance policy?

A. Through the telephone call, a form which we call our C43 which is a coverage sheet was attached to the telephone report.

Q. Well, did you eventually, then, proceed to the Toledo area to investigate the accident?

A. Yes. That was on a Monday morning.

Q. What date was that?

A. I believe it was the 17th, if my memory serves me correctly.

Q. It was a Monday? A. Monday. [169]

Q. How long did you spend in the Toledo area?

A. May I excuse myself there? I went down on Sunday evening, actually, and I started to work about 8:00 o'clock on Monday morning in that area.

Q. How long did you stay down there?

A. I stayed there through the 18th, as near as I can recall.

Q. Two days, is that correct?

A. Two days. Monday and Tuesday.

Q. Would you describe generally your investigation?

A. Well, as I recall, the first thing on that morning I stopped at the—I can't recall the name of the garage where the Gilmont car was. That was merely by accident that I found the car there. I had no idea where the car was. I only knew that it was in the Toledo area.

(Testimony of Donald Eugene Dorris.)

I inspected the Gilmont car and noted the make and model, and so forth, and took pictures of the damage.

From there I went—I found out that Mr. McKinzie's car was at, I believe it is, Dixon Motors there in Toledo, and I went to Dixon Motors and inspected the Cadillac, Mr. McKinzie's car, at that point.

Q. Did you talk to the state police officers during the course of your investigation?

A. During the course of the investigation, yes. I believe it was on Tuesday that I talked to them.

Q. And what were their names, do you recall?

A. Weems. Sergeant Weems and Sergeant Colbert, I believe the names were.

Q. Sergeant Colbert?

A. Colbert. I may be wrong.

Q. Did you review the police reports—state police reports at that time? A. No, I did not.

Q. You did not review them? A. No.

Q. But you did talk to the police officers?

A. I did talk to one of the officers. And one of the officers was not there at the time. He was supposed to be back in a little later in the evening. So I waited there. And I discussed just offhand candidly with the officer that was there. He told me—I believe it was Sergeant Colbert had made out the report.

Q. Were they the investigating officers?

A. As I understand it, yes.

(Testimony of Donald Eugene Dorris.)

Q. And do I understand you just discussed it with them in an offhand manner?

A. With the officer that was there — present there, yes.

Q. And what about with the other officer?

A. When he came in I requested a copy or to give the police report and he said it had been mailed to Salem and that if I wanted to get a copy of it to write to Salem and I could [171] procure a copy of it there.

Q. Well, didn't you discuss his investigation, the facts of the investigation, in detail with him?

A. Not in detail, no.

Q. You did not?

A. No. He told me, I believe—I believe he told me he didn't have his book with him that they put the notes in and that he couldn't give me any facts regarding it.

Q. Did you talk to either Mr. or Mrs. Gilmont—— A. Yes.

Q. ——at that time? Who did you talk to?

A. I talked with Mrs. Gilmont.

Q. Where was Mrs. Gilmont at that time?

A. She was in the hospital.

Q. What was the subject of your conversation?

Mr. Vosburg: May it please the Court, I think I am going to object to that. This inquiry should be limited to after September 3rd and not just what this man did in the course of his investigation. I object to it, your Honor, as not within the purview of your ruling.

(Testimony of Donald Eugene Dorris.)

The Court: Yes. I sustain the objection.

Q. (By Mr. Kennedy): After you completed your investigation in Newport, Mr. Dorris, what did you do thereafter in connection with your investigation?

A. Well, I'd have to think on that for a moment to know just [172] exactly what I had done. I returned to Portland and I suppose I made a preliminary report on the accident, as to the events of the accident.

Q. Now, then—— A. Pardon?

Q. Let me ask you this and maybe it will refresh your memory. Did you talk to Mr. McKinzie's—any of his neighbors or his landlady?

A. Later on during the course of the investigation——

Mr. Vosburg: If your Honor please, I object to this. This isn't limited—he should be limited to after September 3rd. And just that he talked to anybody has no bearing whatsoever on this case.

The Court: May I have the question?

(At this point Mr. Kennedy's last question to the witness and the portion of the witness' answer thereto were read by the Court Reporter.)

The Court: Well, I assume that's on your theory of obtaining information.

Mr. Kennedy: That's right. Reasonable notice.

The Court: You may proceed.

Q. (By Mr. Kennedy): Do you recall the question, Mr. Dorris?

(Testimony of Donald Eugene Dorris.)

A. Yes. I did go to the address of Mr. McKinzie. The actual—the actual date I don't recall. I went to the [173] address that was given to us and knocked on the door and no one answered. As I recall, there was a man nearby mowing the lawn or some such thing and I asked him if he knew Mr. McKinzie and he said he did and that his wife was the landlady. In other words, they were the landlords of Mr. McKinzie. And I talked with—he took me back and introduced me to his wife. And she informed me that Mr. McKinzie had been living there for some time and she volunteered certain information to me at that time, yes.

Q. What information did she volunteer to you?

A. Well, as to—Mr. McKinzie had been—taken the cure for Alcoholics Anonymous.

The Court: I don't think that has anything to do with the matter.

Mr. Vosburg: I still think, your Honor, I object to that and ask it be stricken and the jury asked—instructed to disregard it.

The Court: Members of the jury, the witness' statement as to—he said somebody volunteered the statement to him "McKinzie had taken the cure," is of no concern to us in connection with the rights of these parties. It is stricken from the record and please disregard it.

Q. (By Mr. Kennedy): Mr. Dorris, did you write a letter or make a request with the Department of Motor Vehicles for the driving records of Mr. McKinzie? [174]

(Testimony of Donald Eugene Dorris.)

A. I don't recall who it was to. I did write for a driving record.

Q. Do you remember about when you did that?

A. Approximately July 1st.

Q. Was that after or before your conversation or your attempt to locate Mr. McKinzie through his landlady? A. After.

Q. It was after? A. Yes.

Q. So that your attempt to locate him and any conversation you might have had was before your first request for his driving record?

A. That's right.

Mr. Kennedy: May I have those letters, counsel?

Q. While we are marking some of these exhibits, Mr. Dorris, did you attempt to contact Mr. McKinzie while you were in Newport during your investigation there?

A. I don't remember entirely. But it occurs to me that while in the area someone, I can't say who, informed me or, at least, led me to believe that Mr. McKinzie was in a Portland hospital. Now, I don't——

Q. That's the Veterans Hospital?

A. I don't know. There wasn't any mention of what hospital or anything.

Q. When did you first contact Mr. McKinzie, then? [175] A. The actual date?

Q. Yes. A. July the 26th.

Q. Where did you contact him?

A. At the Veterans Hospital here in Portland.

(Testimony of Donald Eugene Dorris.)

Q. At that time did you take a statement from him? A. I did.

Q. At that time did you take a proof of loss and a release for property damage? A. I did.

Q. Eventually did you issue a check in payment of the property damage? A. Yes, I did.

Mr. Kennedy: Do you have that proof of loss, by chance?

Q. Incidentally, Mr. Dorris, did you inquire with respect to whether Mr. McKinzie had a driver's license at the time that you talked to him?

A. No, I didn't.

Q. As I understand it, that was on July 26th?

A. As my memory serves me it was July the 26th.

Q. While we are still marking exhibits, Mr. Dorris, did you eventually contact the attorney or attorneys who were representing Mr. and Mrs. Gilmont and their minor children?

A. Yes. The date I don't know.

Q. The date you do not know? [176]

A. I don't recall the date, no.

Q. Did you ever discuss the aspects of liability or the possibility of delaying the filing of suit?

Mr. Bosch: Your Honor, we object to that testimony as to the discussion that might have been had with this particular adjuster and any attorney representing the defendants Gilmont. It does not go to the issue which was eliminated earlier by the Court?

Mr. Kennedy: Well, I think it goes to the question of prejudice, your Honor.

(Testimony of Donald Eugene Dorris.)

The Court: What was the question?

(At this point Mr. Kennedy's last question to the witness was read by the Court Reporter.)

The Court: I will sustain the objection to that, not because of your theory but on other grounds. If you claim that there were any overtures made by any person not to file suit there by changing their position, why, that's another thing. But the question to that is entirely different.

Q. (By Mr. Kennedy): Let me ask you directly, Mr. Dorris, did you ever request the attorney representing Mr. and Mrs. Gilmont and their minor children to delay filing suit?

Mr. Vosburg: Just a minute. Your Honor, I think the time limit should be objected to. Certainly the time limit should be in this question and I object to that on that ground. [177] There is no evidence this man has any authority to bind the company.

The Court: If counsel doesn't wish to lay the time foundation this witness will either answer Yes or No and then you can take the witness over on voir dire and ascertain what the time is. I can't dictate to counsel. I would suggest, however, that he change his question as to ascertaining the time element involved.

Mr. Kennedy: Well, it might have been any time, your Honor.

The Court: You don't know, in other words?

Mr. Kennedy: I think I have some information as to what time.

(Testimony of Donald Eugene Dorris.)

The Court: All right. You answer the question Yes or No.

The Witness: I did discuss it with an attorney, yes.

Q. (By Mr. Kennedy): Did you ever at any time—and we will limit this between June 8th, 1957, the date of the accident, and October 1st, 1957, which, I believe, was the date of the filing of this suit — request Mr. Pihl who was representing the Gilmonts to delay filing an action for damages against Mr. McKinzie?

The Court: Don't answer.

Mr. Bosch: If the Court please, the plaintiff objects to this question on the grounds, one, that there has been no authority—or, there has been no testimony to show that this [178] particular witness had any authority to bind the plaintiff; two, I think also that the time limit used in the expression—or, the question is considerably broader than would fall under the previous ruling of the Court.

Mr. Kennedy: Well——

Mr. Bosch: Now, I realize, first, on the first ground there has been no foundation of the authority of this witness to bind the company.

The Court: Is it your position that there was some definite action taken by the plaintiff one way or the other prior to filing the suit?

Mr. Kennedy: Is it my position, your Honor?

The Court: No. I am asking Mr. Bosch.

Mr. Bosch: Would you ask me again, your Honor?

(Testimony of Donald Eugene Dorris.)

The Court: Yes. For clarification's sake it is your contention that the plaintiff took some definite action concerning its position prior to the institution of this present suit?

Mr. Bosch: Yes, your Honor.

The Court: Well, then, you are correct.

Mr. Kennedy: What date, counsel, then? I can correct my question. You want the date and I am just trying to comply with your request. You give me the date and I will ask the question again.

Mr. Bosch: Certainly on the 23rd day of June a letter [179] was written advising the insured that the company then elected to consider the policy null and void.

The Court: All right.

Mr. Kennedy: 23rd day of June?

Mr. Bosch: September. Excuse me.

Mr. Kennedy: Do you want me to limit my question up until that date?

Mr. Bosch: If I understand the ruling of the Court before it would be—well, I am not telling you how to ask the question.

Mr. Kennedy: I will rephrase the question again, your Honor.

Q. Mr. Dorris, at any time between June 8th, 1957, which I understand was the date of the accident, and September 23rd, 1957, which I understand was the date that a letter was written to Mr. McKinzie, did you ever request Mr. Pihl, who was representing Mr. and Mrs. Gilmont and their minor children, to delay filing an action for damages for

(Testimony of Donald Eugene Dorris.)

personal injuries against Mr. McKinzie? Now, wait a minute.

Mr. Bosch: Your Honor, I renew my objection again to that question on the grounds, one, there is no evidence that this particular witness had any authority to speak for or bind the company in this particular respect.

The Court: What do you claim for it?

Mr. Kennedy: Well, I claim that it is a request to— [180] request to delay filing suit on the basis that they were investigating the accident and they had coverage, the question of negotiating. I will ask him what his authority is if that is the basis of the objection.

The Court: Well, he either had express authority or he had implied authority. Now, he said that he was adjusting. Ordinarily an adjuster has no authority whatsoever to determine whether or not the company is going to rescind a contract or take any steps on it.

Now, if you want to interrogate him on what his duties were and what he did in the field, why, maybe there is something to your position under implied authority.

Q. (By Mr. Kennedy): What were your general duties, Mr. Dorris, as an adjuster?

A. Investigation of all accidents and fires.

Q. Taking statements? A. Yes.

Q. Negotiating settlements with claimants?

A. Yes.

Q. Discussing settlement with attorneys?

(Testimony of Donald Eugene Dorris.)

A. Yes.

Q. Actual settlement of cases?

A. May I ask a question at this point?

Q. If you wish.

A. I would like to say this: that up until this point, [181] actually, I was acting in the capacity as a trainee and I had certain authority to act on those matters, yes.

Q. You had certain authority to act?

A. Yes, that's right. I would negotiate——

Mr. Kennedy: I submit the matter, your Honor. And my recollection is that there is some, at least, Oregon authorities on the question of an adjuster having general authority, having authority to bind.

The Court: I would like to see it.

Mr. Kennedy: I don't have it with me.

The Court: May I inquire, did you have authority to settle a case in the field or did you have to report to the home office?

The Witness: To a certain degree I did, yes.

The Court: To what extent?

The Witness: Well, a limit in dollars.

The Court: A limit in dollars?

The Witness: Yes.

The Court: In any of your discussions with any of the parties was there ever any activities came to —within your limits, discussion within your limits?

The Witness: Prior to that date I couldn't say.

The Court: Well, I don't see where you have shown any basis upon which this witness could do

(Testimony of Donald Eugene Dorris.)

anything but speculate to the greatest degree as to what his authority was. [182]

Mr. Kennedy: I take it that the objection is sustained?

The Court: You are right.

Q. (By Mr. Kennedy): Now, Mr. Dorris, certain exhibits have been handed to you commencing with Defendants' Exhibit No. 24 for identification. Is that a letter that you addressed to the Oregon State Police, Bureau of Records, Salem, Oregon, dated July 2nd, 1957? A. Yes.

Q. Or, rather, a copy?

A. It's a copy, yes.

Mr. Kennedy: Yes. Defendant will offer Defendants' Exhibit 24.

Mr. Bosch: No objection.

The Court: It will be received.

(At this point a letter dated July 2nd, 1957, from D. E. Dorris to Oregon State Police, Bureau of Records, Salem, Oregon, previously marked for identification, was received in evidence as Defendants' Exhibit 24.)

Q. (By Mr. Kennedy): Would you read that letter, Mr. Dorris?

A. The address starts out with the address on here: "1101 S.E. Salmon, Portland, Oregon. July 2, 1957. Oregon State Police, Bureau of Records, Salem, Oregon. Re: Our insured Arthur A. McKinzie Accident of 6-8-57 Policy 174380 [183] Gentlemen:

(Testimony of Donald Eugene Dorris.)

The writer requests a search of your records for information regarding the above captioned insured's driving record as to dates and other information regarding previous accidents.

The last known address of the insured, Arthur A. McKinzie, was 4619 S.W. Viewpoint Terrace, Portland, Oregon. He has been driving a 1951 Cadillac coupe, Motor No. 516262287, license No. 4G2710, title No. E1763215 purchased 4-19-57.

Any information you can give us regarding the above captioned insured driver would be appreciated, and please enclose a bill for your services.

Very truly yours, D. E. Dorris, Claims Department."

And down below it is signified "DED" by "wa."

Q. Now, the date of that letter was—is that July 2nd? A. July the 2nd, yes, sir.

Q. Now, the next letter underneath there is Defendants' Exhibit 25. A. 25, correct.

Q. Would you please describe what that letter is?

The Court: That hasn't been received yet.

Mr. Kennedy: Excuse me, your Honor.

Q. That letter, as I understand it, is the letter addressed [184] to the home office, to save time. At this time I will offer it in evidence.

The Court: Any objection?

Mr. Bosch: No objection.

The Court: It will be received.

(At this point a letter dated July 11th, 1957, from Edward M. Syring to Mayflower Insur-

(Testimony of Donald Eugene Dorris.)

ance Exchange, previously marked for identification, was received in evidence as Defendants' Exhibit 25.)

Q. (By Mr. Kennedy): Would you please describe Exhibit 25?

A. This is a letter, original copy, from the Oregon State Department of Motor Vehicles, Salem, Oregon, dated July the 11th, 1957, case No. 55-5427. It is addressed to the Mayflower Insurance Exchange, 2717 Third Avenue, Seattle 1, Washington.

"Dear Sir: Acknowledgment is made of your request for an abstract of driving record on Arthur A. McKinzie.

Inasmuch as there is a charge of $1.00 for a certified abstract of driving record, we are holding your request pending receipt of the aforementioned fee.

Very truly yours, James F. Johnson, Director, by Edward M. Syring, Manager Financial Responsibility." [185]

Q. The date of that letter is July 11th?

A. July 11th.

Mr. Kennedy: Now, at this time, defendant will offer Defendants' Exhibit 26.

The Court: Any objection?

Mr. Bosch: What is it?

Mr. Kennedy: 26 is the copy of the letter from the home office addressed to the State of Oregon, Department of Motor Vehicles.

Mr. Bosch: No objection.

The Court: Did he enclose the dollar there?

(Testimony of Donald Eugene Dorris.)

Mr. Kennedy: I don't believe so, your Honor. We have to cut costs somewhere.

Q. Would you please describe that letter?

A. This is a carbon copy of a letter signed by Mr. R. T. Carlson, underwriting department.

Q. Is that from Seattle?

A. Presumably, yes.

Q. Go ahead.

A. Do you want me to read it? It's dated July 18th, 1957, State of Oregon, Department of Motor Vehicles, Salem, Oregon, Policy No. 174380, Re: Arthur A. McKinzie. Your Case 55-5427.

"Gentlemen: Regarding your letter of July 11, we find no record of anyone in this office requesting the abstract of driving record on Arthur A. McKinzie.

We would appreciate your giving us the name of the person requesting such report, as undoubtedly someone did, so that we may refer this to the proper person.

Thank you for your cooperation.

Very truly yours, R. T. Carlson, Underwriting Department," and then there is a — inked in here under remarks it says "Claim department in Portland has this claim file No. 1-23651." Now, what date that was on there or not, I don't know.

Mr. Kennedy: Thank you, Mr. Dorris. Defendant will offer Defendants' Exhibit No. 27 which is an original letter dated July 25th, 1957, addressed to the Seattle office of Mayflower Insurance Exchange from the Department of Motor Vehicles.

Mr. Bosch: No objection.

(Testimony of Donald Eugene Dorris.)

The Court: It will be received.

(At this point a letter dated July 25, 1957, from Edward M. Syring to R. T. Carlson, Underwriting Department, Mayflower Insurance Exchange, previously marked for identification, was received in evidence as Defendants' Exhibit 27.)

Q. (By Mr. Kennedy): Would you please describe and read Exhibit 27? [187]

A. This is a——

Q. I hate to put you to all this work.

A. Yes. This is on a letterhead from the State of Oregon, Department of Motor Vehicles, Salem, Oregon. It's dated July 25th, 1957, Re: 55-5427. It's directed to Mr. R. T. Carlson, Underwriting Department, Mayflower Insurance Exchange, 2717 Third Avenue, Seattle 1, Washington.

"Dear Sir: In reply to your letter of July 18th relative to an abstract of driving record on Arthur A. McKinzie, please be advised that this request was made by D. E. Dorris, Claims Department.

We are sorry our letter failed to give this information.

Very truly yours, James F. Johnson, Director."

And it is signed by Mr. Edward Syring, again. Whatever—and on this—by the way, this is from the Financial Responsibility Department. He is the manager. On this there is in red ink—it says: "To: Portland Claims" line "R.C.," which, I presume, is Mr. Ray Carlson. Dated 7/27/57. And down below here is a comment to me, "Don" line drawn under-

(Testimony of Donald Eugene Dorris.)

neath "the State wrote us and said $1.00, please. We wrote to find out who ordered it. No record here." And R.C. again.

Q. Now, Mr. Dorris, I will ask you to look at Defendants' Exhibit No. 28 for identification, and I will ask if that's a letter. [188]

The Court: Are you offering that exhibit?

Mr. Kennedy: I will just have him identify it first, your Honor.

The Court: Very well.

Q. (By Mr. Kennedy): Is that a letter you wrote to the State of Oregon?

A. It is a copy of a letter.

Q. Incidentally, what was the date of the last exhibit, that letter addressed to Mayflower from the State of Oregon?

A. Addressed to Mr.—this was 25—that's Exhibit No. 27. That's July the 25th.

Mr. Kennedy: All right. Defendant will offer Defendants' Exhibit 28.

Mr. Bosch: No objection.

The Court: It will be received.

(At this point a letter dated August 20, 1957, from D. E. Dorris to State of Oregon, Department of Motor Vehicles, Salem, Oregon, previously marked for identification, was received in evidence as Defendants' Exhibit 28.)

Q. (By Mr. Kennedy): Would you read this letter that you wrote to the Department of Motor Vehicles, then, Mr. Dorris? First, what is the date of it?

(Testimony of Donald Eugene Dorris.)

A. The date on this is August the 20th, 1957. This is a [189] carbon copy of a letter, our address at the top, 1101 S. E. Salmon, Portland, Oregon. August the 20th, 1957.

"State of Oregon, Department of Motor Vehicles, Salem, Oregon. Re Your file 55-5427. Our insured Arthur A. McKinzie. Accident of 6-8-57. Policy 174380.

Attention: Edward M. Syring, Financial Responsibility.

Gentlemen: It appears that there is some confusion in this matter.

On 7-18-57 the writer requested an abstract of the driving record of Mr. Arthur A. McKinzie, our insured. Please advise if this information is available.

If the information is available please forward to this office with a copy of your billing.

Very truly yours, D. E. Dorris, Portland Claims Department."

Q. And then did you receive a response to that letter? I direct your attention to Defendants' Exhibit for identification No. 29.

A. I don't have it here.

Q. You do not have it there?

The Court: What was the date, please?

The Witness: The date of this was August the 20th. [190]

The Court: August 20th.

Mr. Kennedy: Now, I hand you—or, you have Defendants' Exhibit No. 29.

(Testimony of Donald Eugene Dorris.)

Q. Is that the response that you received of the Motor Vehicle——

A. Could I read it over here?

Q. Go ahead and read it over.

A. All right.

Mr. Kennedy: Well, I will offer it.

Mr. Bosch: No objection.

The Court: It will be received.

(At this point a letter dated August 23, 1957, from Edward M. Syring to D. E. Dorris, previously marked for identification, was received in evidence as Defendants' Exhibit 29.)

Q. (By Mr. Kennedy): Would you read it?

A. Yes. Just a moment. This is, once again, on the letterhead from the State of Oregon, Department of Motor Vehicles, Salem, Oregon, dated August 23rd, 1957. File No. 55-5427. Then it is directed to me, D. E. Dorris, Mayflower Insurance Exchange, 1101 Southeast Salmon, Portland, Oregon.

"Dear Mr. Dorris: Acknowledgment is made of your letter of August 20, 1957, in which you request an abstract of driving record for Arthur A. [191] McKinzie.

Inasmuch as your check was not included in your request, it will be necessary that you forward us $1.00 which is the charge for each driving record. We have been holding your request pending receipt of aforementioned fee.

Very truly yours, James F. Johnson, Director," signed by Mr. Edward Syring.

(Testimony of Donald Eugene Dorris.)

Q. What is the date of that letter?

A. That is August the 23rd.

Q. Now, you have in your hand Defendants' Exhibit No. 30? A. That's right.

Mr. Kennedy: I will offer that.

Mr. Bosch: No objection.

The Court: It will be received.

(At this point a document purporting to be a receipt from Department of Motor Vehicles, previously marked for identification, was received in evidence as Defendants' Exhibit 30.)

Q. (By Mr. Kennedy): Now, that's the receipt for the dollar, is it not, Mr. Dorris?

A. That is right.

Q. What is the date of that receipt?

A. The date on it is September 4, 1957, for $1.

Q. Did you write a letter of transmittal with your check for a dollar?

A. I don't recall that, sir.

Q. Now, Mr. Dorris, I assume that, then, you received the abstract of the driving record?

A. The same day I received this (witness brandishes document).

Mr. Kennedy: 30 was received, was it not?

The Court: Yes.

Q. (By Mr. Kennedy): Now, Mr. Dorris, I am handing you for identification Defendants' Exhibit, I believe it is, 31, the proof of loss. A. Yes.

Q. I will ask you, is that the proof of loss and release that you obtained from Mr. McKinzie?

(Testimony of Donald Eugene Dorris.)

A. Yes; this is the original.

Mr. Kennedy: Defendant will offer Defendants' Exhibit 31.

Mr. Bosch: Your Honor, we will object to the introduction of that into evidence on the grounds that that has nothing to do with the matter which the Court has heretofore ruled on.

The Court: May I see it, please?

(At this point the witness handed document to the Court.)

Mr. Bosch: I would like to invite the Court's attention to the Plaintiff's Exhibit No. 3, the loss payable endorsement.

The Court: Defendants' Exhibit 3? [193]

Mr. Bosch: That is the copy of the policy. Plaintiff's, your Honor. That's the plaintiff's exhibit, the policy. The loss payable endorsement.

The Court: I see it is almost five o'clock. Do you have any other matters that you can go into so I can deal with this, or are you——

Mr. Kennedy: I don't believe I have anything further except, of course, the following exhibit, your Honor.

The Court: Well, members of the jury, I see it is right at five o'clock. We will recess for the night-time. Recall the admonition of the Court. Do not discuss the matter among yourselves or permit any person to discuss it with you.

Tomorrow morning at 9:30, please. 9:30 tomorrow morning.

(At this point the jury left the courtroom and the following proceedings were had out of the presence of the jury:)

Mr. Bosch: If the Court please, on this point I cited some cases. It's on the foot of the second page.

The Court: Yes. Now, you say look at the loss payable clause.

Mr. Bosch: I don't have a copy, your Honor. But it's my recollection that the endorsement for the mortgagee's benefit makes it, at least under these circumstances, obligatory on the insurance company regardless of any defenses it [194] might have against the named insured. It is the usual form of loss payable endorsement. And I think along towards about the third paragraph or so it provides——

The Court: Well, let's see what we have got here. I am reading, counsel, from what purports to be the automobile loss payable endorsement attached to the copy of the policy.

"With respect to the interest of the Lien-holder named on the face of Policy Declaration.

it's successors," et cetera, "Loss or damage, if any, to the property described in this policy shall be payable firstly to the Lien-holder and secondly to the insured, as their interests may appear, provided nevertheless that upon demand by the Lien-holder upon the Company for separate settlement the amount of said loss shall be paid directly to the Lien-holder to the extent of its interest and the balance, if any, shall be payable to the insured."

All right. Now, in this case we have pay jointly to the insured.

Mr. Bosch: The draft was made that way, your Honor. The funds, I am prepared to prove, never found their way to the insured.

The Court: Well, I think my present thought is that is a burden of the defendant in connection with this matter. [195]

"2. The insurance under this policy as to the interest only of the Lien-holder shall not be impaired in any way by any change in the title or ownership of the property or by any breach of warranty or condition of the policy, or by any omission or neglect, or by the performance of any act in violation of any terms or conditions of the policy or because of the failure to perform any act required by the terms or conditions of the policy or because of the subjection of the property to any conditions, use or operation not permitted by the policy or because of any false statement concerning the policy or the subject thereof, by the insured or the insured's employees, agents or representatives; whether occurring before or after the attachment of this agreement, or whether before or after the loss; Provided, however, that the wrongful conversion, embezzlement or secretion by the Purchaser, Mortgagor, or Lessee in possession of the insured property under mortgage, conditional sale contract, lease agreement, or other contract is not covered under this policy * * *"

I see your point. Haskins against Greene, Meader against Farmers Mutual Fire Relief Association, Prather against National Fire Insurance Company, State Farm Mutual, which is a Ninth Circuit case.

Mr. Bosch: That State Farm case is right on point, your Honor.

The Court: That's the Ninth Circuit.

Mr. Bosch: I don't think it is the Ninth Circuit, your Honor. It's cited up above at the top.

The Court: I see. It is a Federal Supplement.

Mr. Bosch: It's a District Court case. It was never appealed.

The Court: "Where the policy provides for payment thereof to the mortgagee despite any breaches of conditions by the mortgagor, and for subrogation thereupon to the rights of the mortgagee, payment to the mortgagee made pursuant thereto is not a waiver by insurer, particularly where the mortgagor, to his prejudice, was not led to rely on payment."

Mr. Kennedy: May I make my position just very briefly clear, your Honor? There was a release. If the Court will read what is called the proof of loss, it is a release. There was a release and proof of loss taken from Mr. McKinzie, not from City Finance Company. They also saw fit to draw a check payable to both Mr. McKinzie and the City Finance Company to be offered——

The Court: That's pursuant to the terms of the policy.

Mr. Kennedy: Well, I am saying it's some evi-

dence. They can argue the policy and that's all I claim for it, your [197] Honor.

The Court: All right. If you can show that any part of this check came into the hands of the defendant assured I could bear with you.

Mr. Kennedy: Well, I think the documents speak for themselves there, the ones that paid him. If that isn't true they ought to produce him. They are the ones that took the release from him. They are the ones that made him a joint payee. All we have is counsel's statement that "I am sure he didn't get any." I don't know. Let them call him.

The Court: Oh. You don't know?

Mr. Bosch: Your Honor, what I said—when I said I was prepared—I said, "I am prepared to subpoena an officer from City Finance." I have only at this time a photostatic copy of their records. I am prepared to put on testimony, if the Court so wishes. The burden is not yet on——

The Court: I can only do this: The only power the Court has to do it—now, a phone call would satisfy counsel as to whether or not any part of this money got into the hands of the insured. So, in the morning if counsel aren't in a position—I mean, all counsel are not in a position to stipulate in the record that either the insured did or did not receive funds from the proceeds of this check to his benefit on account of the loss of his automobile and the amount of any such payment, if there was a payment, then, I [198] shall assess costs against the person whom the evidence goes against.

Mr. Kennedy: I can possibly simplify this. If

Mr. Bosch has firsthand knowledge that he did not receive any funds as a result of this and if Mr. Bosch tells me that, I will, of course, stipulate to it.

The Court: Very well.

Mr. Bosch: May I say what I know, your Honor? I don't know firsthand. I wasn't there when the check was delivered. But I do know——

The Court: I wonder this: Are you in a position to represent to counsel that you hold there a photostatic copy of these people's records?

Mr. Bosch: I am, your Honor. And I will furnish it.

The Court: Let him see it.

Mr. Kennedy: Your Honor, defendant will withdraw the last two exhibits in the controversy.

The Court: Thank you. All right. Let's recess.

(At this point court adjourned at 5:10 P.M.)

Morning Session

9:30 o'clock a.m., Portland, Oregon

The Court: Defendant's next witness.

Mr. Kennedy: Mr. Dorris was on the stand, your Honor, and I finished my direct examination.

The Court: Any cross examination, Mr. Bosch?

Mr. Bosch: If you please, your Honor.

The Court: Very well, please take the stand.

DONALD EUGENE DORRIS

produced as a witness in behalf of the defendants, having been previously duly sworn by the Clerk, resumed the stand and testified as follows:

Cross Examination

Q. (By Mr. Bosch): How long have you been employed by the plaintiff, Mr. Dorris?

A. Since April of '57.

Q. April of '57. That would be the same month that Mr. McKinzie made his application?

A. Yes, I believe so.

Q. Come June of that same year you would have worked for the company, April, May, about three months, two months, two or three months?

A. Yes, sir.

Q. During those months that you worked for the plaintiff, [200] what were your duties?

A. Mainly, I was working under the supervision of another adjuster and, in other words, training as adjuster with him.

Q. Well, did your duties cover the entire field of adjusting? In other words, property damage, personal injury, the whole broad field?

A. Yes.

Q. This particular file, the one that was given to you after the accident was reported some time after June 7th, how many files, personal injury files, had you had occasion to adjust yourself before that was given to you?

Mr. Kennedy: Object to this line of questioning, your Honor. Has no relevancy for the——

(Testimony of Donald Eugene Dorris.)

The Court: May I have the question?

(Last question read back by the court reporter.)

The Court: Well, all of the intentions of defendants have been removed from the case, with the exception of the one that is at issue at the moment. I think I understand your premise you are asking about. I don't think it makes any particular, I don't think you will arrive at the experience by asking how many files he has.

Mr. Bosch: I won't pursue it further, your Honor.

The Court: Ask him about the experience as an adjuster. You can do that. You can do so, but how many files I don't believe is pertinent. [201]

Mr. Bosch: I have no further questions.

Mr. Kennedy: Defendant will call Mr. Kosta.

MELVIN KOSTA

produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Kennedy): Your name is Melvin Kosta? A. That's correct.

Q. Mr. Kosta, you are the Claims Manager for Mayflower Insurance Exchange in this particular area, are you not? A. That's correct.

Q. You are also an attorney duly admitted to practice in the state and in this Court, are you not?

(Testimony of Melvin Kosta.)

A. That's correct.

Q. Now, Mr. Kosta, how long have you been Claims Manager for Mayflower?

A. Since May 6, 1957.

Q. And the adjustment of the claims is under your direct supervision in this particular area?

A. That's correct.

Q. On June 8, 1957, how many adjusters, excluding yourself, as Claims Manager, were there working in the Portland office? A. Four.

Q. Were all four adjusters, did they have, were they assigned to adjust losses more or less equally, or did you make some distinction or difference between them? [203]

A. It depended on the experience or the different categories in the adjusting, as far as injury files or physical damage files, and it depends on the experience of the individual.

Q. I understand in this case—correct me if I am wrong—you assigned Mr. Dorris to investigate the personal injury aspects and the property damage aspects of the automobile collision between the automobile of Mr. McKinzie and the Gilmonts?

A. Correct: He was the only one that was available to go at that time.

Q. Do you recall when you assigned this particular file to him?

A. No, I do not recall, but it was just shortly after the accident occurred. I cannot give a specific date.

(Testimony of Melvin Kosta.)

Q. Now did you have occasion to discuss this particular case with Mr. Dorris thereafter?

A. Well, it's my particular job to supervise the investigations and the handling of claims, and there were some discussions between Mr. Dorris and myself regarding this particular case.

Q. In other words, you were supervising this claim also, were you not?

A. To a certain extent, yes.

Q. Your general duties are to supervise them?

A. That's correct.

Q. You were supervising this claim along with the other claims? A. That's correct.

Q. Mr. Kosta, do you recall a conversation with Mr. Dorris or receiving some information from Mr. Dorris, I would say around about July 1st, regarding his discussions with either a lady or a neighbor or Mr. McKinzie?

Mr. Bosch: If the Court please, I make this objection, that the answer so framed does not permit us to know whether this information will fall——

The Court: It will fall, if it falls within the same line as the last one, I think you are out of bounds.

Mr. Kennedy: It calls for a yes or no answer, your Honor.

The Court: I'll bear with you on it. It's either yes or no.

The Witness: Would you ask the question again or would you read it back, please?

(The last question read back by the Court Reporter.)

(Testimony of Melvin Kosta.)

The Witness: Yes.

The Court: Purely hearsay.

Mr. Kennedy: I'm sorry, your Honor.

The Court: I say that's hearsay.

Mr. Kennedy: Both employees of the plaintiff, your Honor. [205]

The Court: What right does this plaintiff have on cross examination of a person who is supposed to have made the statement? If it's along the same lines as the question the Court ruled on yesterday, you are out of bounds, Mr. Kennedy.

Mr. Kennedy: Very well, your Honor.

Q. (By Mr. Kennedy): Mr. Kosta, did you apprise the State of Oregon for a motor vehicle driving report? A. I did not myself, no.

Q. Did you direct Mr. Dorris to do so?

Mr. Bosch: Your Honor, again it's hearsay, and I think the record has previously been put in here, the series of letters that clearly showed——

The Court: It wasn't the question. He asked if this man directed him to do that. You may answer.

The Witness: No, I did not.

Q. (By Mr. Kennedy): You did not?

A. No.

Q. Mr. Kosta, in the regular course of your duties as Claims Manager do you write to parties involved in an accident for various information?

A. You mean personally?

Q. Yes.

A. After I take over the specific supervision of

(Testimony of Melvin Kosta.)

a particular file, yes. But up until the time the file is turned over to [206] me for actual handling, I do not do the corresponding myself, no.

Q. Mr. Kosta, Mr. Price is handing you what has been marked as defendants' Exhibit No. 33 for identification. Did you write that letter to Mr. and Mrs. Gilmont, or whoever it was to?

A. I did not write this letter. This is a form letter that's sent over my signature. I did not sign the letter.

Q. You did not sign it? A. No, I did not.

Q. Do you know who did sign it?

A. The initials S.R. at the bottom, I presume a secretary in the office by the name of Shirley Robinson, I believe, signed that.

Q. Had you given her authority to sign your name?

A. There is certain correspondence in the office that does go out over my signature in which the secretaries sign, yes.

Q. Is that one of the cases? A. Yes.

Mr. Kennedy: We'll offer——

Mr. Bosch: May I inquire the date of that letter?

The Witness: June 13, 1957.

Mr. Bosch: Clearly falls without the scope of our issue, your Honor. June 13th is about two days after the notice of the accident was given to the company. I think there is no [207] proof at this stage that the company had any knowledge of any misrepresentation at this date, your Honor.

The Court: What do you claim for the letter?

(Testimony of Melvin Kosta.)

Mr. Kennedy: I claim at that time they commenced to negotiate with Mr. and Mrs. Gilmont.

The Court: Very well, it will be received. It is for the jury to determine whether or not defendant had any notice concerning their contentions now.

Mr. Kennedy: Thank you, your Honor.

(At this point defendants' Exhibit 33, previously marked for identification, was received in evidence.)

Q. Now, Mr. Kosta, I'll hand you plaintiff's Exhibit 8, which has been received into evidence, which I understand is a letter that you wrote to Mr. McKinzie on September 23rd of 1957, is that correct? Or rather, it's a copy of a letter.

A. That's correct, yes.

Q. Did you write that letter? A. Yes.

Q. You dictated it yourself?

A. As I recall, I did.

Q. Let me ask you this, Mr. Kosta. At that time was your investigation complete regarding this accident?

A. What particular phase of the investigation are you referring to? [208]

Q. All phases of it.

A. I would say substantially, yes.

Q. Would you read that letter, Mr. Kosta?

The Court: It hasn't been offered yet, has it?

Mr. Kennedy: It's been received, your Honor.

The Court: I beg your pardon. What was the number of it?

(Testimony of Melvin Kosta.)

Mr. Kennedy: It's 9, isn't it, Mr. Kosta?

The Witness: Exhibit 8. Marked received. This is a copy of a letter directed to Arthur McKinzie, in care of the Veterans Hospital, Portland, Oregon, under date of September 23, 1957.

"Dear Mr. McKinzie:

In re Mayflower Policy No. 174380.

Enclosed is our check made payable to your order in the sum of $20.00 which represents the full premium paid by you on the above-captioned policy from the date of issue, April 16, 1957.

On April 16, 1957, you signed an Applicant's statement in which you answered in the negative questions as to whether your driver's license had been revoked or suspended and whether you had received any driving charges, citations, or fines (not parking) within three years prior to the date of the application. During the course of the investigation made subsequent to the accident which you had on June 8, 1957, we have learned from the [209] Department of Motor Vehicles of Oregon that on February 16, 1957, your driver's license had been suspended for an additional year and that this suspension was still in effect on April 16, 1957. Our investigation has also disclosed that you were convicted in the District Court of the State of Oregon for the County of Benton under date of February 14, 1956, of the traffic offense of 'no muffler.' If the questions put to you on your Applicant's Statement had been truthfully answered we would not have issued the above-captioned policy

(Testimony of Melvin Kosta.)

to you, and because of these misrepresentations we hereby elect to rescind the coverage from the date of issuance, to-wit, April 16, 1957."

Signed: "Mayflower Insurance Exchange," by myself.

Q. (By Mr. Kennedy): The misrepresentations that you referred to were the fact that he did not have his driver's, an Oregon driver's license at the time that he applied for the insurance, and the fact that he was convicted of the traffic offense of no muffler?

Mr. Bosch: If the Court please, I think the letter which Mr. Kosta read speaks for itself.

Mr. Kennedy: Very well, I withdraw the question, your Honor.

Q. (By Mr. Kennedy): Now at that time did you forward a check to Mr. McKinzie in the amount of $20.00? [210] A. That's correct.

Q. What was the purpose of forwarding that check to him?

A. That was the premium that he had paid.

Mr. Kennedy: That's all.

The Court: Cross examine.

Cross Examination

Q. (By Mr. Bosch): Mr. Kosta, do you recall after this comedy of errors that your office, the Seattle office, and Salem, when you finally received the information up from Salem as to Mr. McKinzie's driving record?

A. As I recall, it was sometime in September.

(Testimony of Melvin Kosta.)

Q. Now that letter which you have just read to the jury dated September 23, I think, you had had the information then from the Salem office, Department of Motor Vehicles, as to Mr. McKinzie's driving record, is that correct?

A. That's correct.

Q. At that time did you know about his driving record in the State of California?

Mr. Kennedy: Just a moment. I object to that, your Honor, on the grounds they are bound by the letter of rescission. I refer the Court to the case of Ward vs. Queen City, 69 Ore. 347, 122, Ore. 527.

Mr. Bosch: Both of those cases, as I recall, hold that a person once setting grounds on which they intend to rescind [211] the contract are bound by those, and they can't set up others if they know of other grounds at the time they make their election.

The Court: That's correct.

Mr. Bosch: You don't waive what you don't know.

The Court: May I have the question?

(The last question read back by the court reporter.)

The Court: You may answer.

The Witness: No.

Q. (By Mr. Bosch): There was some period of time from the time you got your information from the State of Oregon until you got your draft of a letter to Mr. McKinzie and advised him that you were going to rescind? A. That's correct.

(Testimony of Melvin Kosta.)

Q. Tell the Court what happened in the interim between the time your office first had notice of the vision of his records and the time you notified him you intended to rescind the contract. Explain to the jury exactly what you did and what the company did.

A. I might first state that questions of coverage involving policies are home office or questions to be submitted to the home office for decision. I have no authority to deny coverage on any policy. The facts are to be accumulated and sent to our home office, and they are the ones that make the decision. Which was what took place in this particular case. [212] And after I had corresponded and had conversations with my home office, thereafter conferred with Mr. Bosch's office. As I recall, by telephone.

Q. Mr. Kosta, was the ultimate decision then to rescind this contract and commence this particular suit preparatory judgment one of policy for the home office, was that the decision for the home office to make?

A. The question of deciding as to whether or not coverage should be rescinded was the decision and the policy of the home office.

Q. As soon as that decision was made you notified Mr. McKinzie of that decision?

A. That's correct.

Mr. Bosch: That's all.

The Court: Any redirect?

(Testimony of Melvin Kosta.)

Mr. Kennedy: Could I have just one second, your Honor?

The Court: Yes, indeed, you may.

Redirect Examination

Q. (By Mr. Kennedy): Didn't you give your home office some advice with regard to this matter?

A. I am a practicing attorney. Yes, I did give them some advice.

Q. It wasn't solely the decision of the home office?

A. I have no control of decisions they make. [213] Whatever advice I may have given them would actually ultimately have no effect on their decision itself.

Q. In other words, it wasn't a case of you didn't do anything about it. It was a case where you corresponded with the home office and reached sort of a joint conclusion, did you not?

A. Well, as Claims Manager it is necessary for me to give them some information and an opinion as to what I think.

Q. You advised them to forward the check in the amount of $20.00 to him, didn't you?

A. As I recall, I think I did.

Mr. Kennedy: That's all.

The Court: That's all, sir, you may step down. Defendants' next witness.

Mr. Kennedy: Defendant will call Sergeant William J. Colbert. [214]

WILLIAM J. COLBERT

produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Kennedy): Your name is William J. Colbert? A. Yes, sir.

Q. What is your occupation or profession, Mr. Colbert?

A. I'm sergeant of the Oregon State Police, stationed at Newport, Oregon.

Q. Are you in charge of that particular office?

A. I am in charge of Lincoln County and the western half of Lane County.

Q. How long have you been a member of the State Police? A. Nineteen years.

Q. Did you have occasion to investigate an automobile accident which occurred on June the 8th, 1957, near Toledo, Oregon, between automobiles operated by a Mr. McKinzie and an automobile operated by Mr. Gilmont? A. Yes, sir.

Q. And did you later, Sergeant, prepare a report of the accident? A. Yes, sir.

Q. Now, Sergeant, do you recall at your office Mr. Donald Dorris, who sits in the back of the courtroom, contacting [215] you regarding the facts of the accident or the report?

A. No, I don't.

Q. You see quite a few people, don't you?

A. Yes, sir.

(Testimony of William J. Colbert.)

Q. And quite a few, you prepare quite a few reports, is that correct? A. Yes, sir.

Q. Would you describe generally what you do with the reports that you prepare?

A. We prepare a report and send the original and one copy to Salem and, before July of '57 we kept all copies of the accident reports that we made for our files.

Q. On this particular occasion did you keep a copy of the report? A. I did, yes, sir.

Q. Do you know when you forwarded the original report to Salem?

A. I believe it was on June the 13th.

Q. Do you have a copy of the report with you?

A. I have, yes, sir.

Mr. Kennedy: Do you have any objection to his referring to it?

Mr. Bosch: I can't keep him from referring to it.

Q. (By Mr. Kennedy): Would you be able to tell by looking at your copy of the report, Sergeant, when you forwarded the original to Salem? [216]

A. Well, I would say on June 13th.

Q. But you retained that copy?

A. Yes, sir.

Q. Now, Sergeant, on that, on the original and on your copy of the report did it indicate that Mr. McKinzie did not have an Oregon driver's license?

Mr. Bosch: Object to that, your Honor. It has not been introduced in evidence. He can speak from his own recollection and investigation.

(Testimony of William J. Colbert.)

The Court: He may use the report to refresh his memory, if it does. You may inquire.

Q. (By Mr. Kennedy): Do you have a recollection, Sergeant, as to whether in the report it is stated that Mr. McKinzie did not have an Oregon driver's license? A. Yes, sir.

Q. It did so state? A. It did so state.

Mr. Bosch: I don't see what the connection is between this and any testimony previously put in here which would tie this knowledge on the part of the plaintiff.

Mr. Kennedy: Your Honor, it's the position of the defendant that the plaintiff in this case is seeking to rescind this insurance contract, and when they are seeking to rescind, if they acquire knowledge of any information or [217] of any fraud in the application, they are obligated as a substantive matter to rescind immediately, and any delay——

The Court: Your position is that you intend to connect this witness up with the plaintiff, the testimony of this witness?

Mr. Kennedy: I intend to show by Sergeant Colbert that the report itself stated that Mr. McKinzie did not have a driver's license, that Sergeant Colbert of course knew that, and that Mr. Dorris, the adjuster, talked to Sergeant Colbert and if he asked him for the report, he would have received that copy of the report.

Mr. Bosch: There is no evidence whatsoever, your Honor, at this stage, at least, that Mr. Dorris asked for it, knew it was available.

(Testimony of William J. Colbert.)

The Court: All I did was ask Counsel if he represented to us that he intended to connect up this information with the plaintiff.

Mr. Kennedy: Mr. Dorris testified, it is my recollection that Mr. Dorris testified that he asked the Sergeant for the report. The Sergeant told him it was not available because he had sent it to Salem.

The Court: All right. How does that bind the plaintiff?

Mr. Kennedy: Well, it wasn't, the copy of the report was available to him. That's what I intend to show.

The Court: I thought you just said the Sergeant [218] told him it had to go to Salem. You mean he should have written to Salem to get it?

Mr. Kennedy: No. He retained a copy of the report which was available, your Honor.

The Court: All right, let's get the cart in front of the horse for a while. Ask him what conversation he had with Dorris and we'll find out.

Q. (By Mr. Kennedy): Do you recall any conversation with Mr. Dorris, Sergeant?

A. No, I don't.

Q. What is your usual practice with respect to disclosing the contents of the police reports to adjusters or attorneys inquiring?

Mr. Bosch: If the Court please, I don't think the usual practice is relevant. He testified he had no conversation, or recalls none, with Mr. Dorris.

The Court: Didn't recall. The objection will be sustained.

(Testimony of William J. Colbert.)

Q. (By Mr. Kennedy): Sergeant, do you know how long Mr. McKinzie was in the Newport area?

Mr. Bosch: That's entirely irrelevant.

The Court: I don't know whether it is or not. You may answer.

The Witness: About four weeks.

Q. (By Mr. Kennedy): About four weeks?

A. After the accident. [219]

Q. After the accident. And then later on he was removed to the Portland hospital?

A. Veterans Hospital in Portland.

Mr. Kennedy: That's all. You may examine.

Mr. Bosch: I have no questions.

The Court: That's all, Sergeant. You may step down.

Mr. Kennedy: Call Mrs. Gilmont. [220]

ROSE MARIE GILMONT

produced as a witness in behalf of the defendants, being first duly sworn by the Clerk, was examined, and testified as follows:

Direct Examination

Q. (By Mr. Kennedy): Your name is Rose Gilmont? A. Yes.

Q. And you are one of the defendants in this case, are you not? A. Yes.

Q. How many children do you have?

A. I have four children.

Q. Your husband is Mr. Robert Gilmont, one of the other defendants, is that correct?

(Testimony of Rose Marie Gilmont.)

A. That's correct.

Q. Now Mrs. Gilmont, immediately after this accident were you removed to the hospital around the Toledo area? A. Yes, I was removed.

Mr. Bosch: Your Honor, perhaps it might shorten it up—we are willing to concede in this case there was some personal injury involved in this accident.

The Court: It has no bearing.

Mr. Kennedy: I haven't asked any questions like that, your Honor, and I don't intend to.

The Court: Very well, may I have the question?

(The last question read back by the court reporter.) [221]

Q. (By Mr. Kennedy): When did you enter the hospital?

A. Well, I was taken to the Toledo Hospital some time following the accident, the evening of June the 8th, the exact time I do not know.

Q. Now while you were at the hospital, did you have occasion to talk to Mr. Dorris, the adjuster for Mayflower Insurance Exchange?

A. Yes, I did.

Q. Do you recall when that was?

A. Well, I cannot be positive because I was in a state of shock.

Q. Don't describe your injuries.

A. No, but it was my impression that it was the Tuesday or Wednesday following the accident.

Q. Tuesday or Wednesday following the acci-

(Testimony of Rose Marie Gilmont.)

dent. Do you remember the day of the week that the accident occurred?

A. It was Saturday evening, the 8th.

Q. Saturday. And it would be, it's your recollection it would be the following Monday or Tuesday? A. Tuesday or Wednesday.

Q. Tuesday or Wednesday. Do you recall your conversation with Mr. Dorris? A. Yes, I do.

Q. What conversation did you have with him?

Mr. Bosch: Your Honor, I object to any conversation here. As I recall the previous ruling of the Court, the Court has already eliminated the introduction of any evidence as to Mr. Dorris' conversation insofar as his capacity to bind the company is concerned. Now if it's a matter of talking about the facts of the accident, I have no objection to that, although I still don't see the relevancy of the facts of the accident. We know it happened and somebody was hurt.

The Court: It is conceded there was an accident and it is conceded these people were hurt and received, I assume—what do you claim for it, Mr. Kennedy?

Mr. Kennedy: I can make my question more specific and withdraw that question, your Honor.

Q. (By Mr. Kennedy): Mrs. Gilmont, did Mr. Dorris inquire of you as to the whereabouts of Mr. McKinzie during that conversation?

A. Yes, it's my recollection that he did.

Q. What did you tell him?

A. I told him that I had been told by the doc-

(Testimony of Rose Marie Gilmont.)

tors and the nurses and people visiting me that he was in the Newport Hospital.

Mr. Kennedy: I have no further questions.

Mr. Bosch: No questions.

The Court: That's all, ma'am.

Mr. Kennedy: Your Honor, at this time defendants Gilmont [223] will offer the amended and supplemental answer of defendants Gilmont. That's in accordance with the Court's ruling. It will be offered during the case in chief.

Mr. Bosch: Has the Court ruled on it?

The Court: No, I haven't got it even out, haven't marked it yet.

(At this point defendants' Exhibit 34, amended and supplemental answer, was marked for identification.)

The Court: It's been marked as defendants' 34, and you are offering it now?

Mr. Kennedy: We will offer defendants' 34.

The Court: Any objection?

Mr. Bosch: Yes, your Honor. Those are self-serving declarations. They have been supplemented and preceded by our pre-trial order. I admit we offered the original answer, but that was for the purpose of admitting against interest. These are self-serving.

Mr. Kennedy: It shows there is not an admission against interest, your Honor.

Mr. Bosch: The pre-trial order shows that, your Honor.

Mr. Kennedy: Do you want the pre-trial order? I'll offer the pre-trial order, if that's what you want.

The Court: Do you claim that this tends to explain——

Mr. Kennedy: Yes, your Honor, it does. [224]

The Court: All right, with reference to what contention?

Mr. Kennedy: Well, counsel, as I understand it, in the original answer, in a blanket admission of certain paragraphs, I think counsel is claiming that because the attorneys representing them overlooked some admission that we——

The Court: That's an argument.

Mr. Kennedy: I'm sorry, your Honor. But he is claiming an admission in an original answer. I am offering the amended and supplemental answer to show that it's explained, that it is not, that we did not admit it and we do not admit it.

The Court: Let's see it.

Mr. Bosch: To keep it from being self-serving, your Honor, you can cure all kinds of defects.

The Court: Well, for example, if I should tell you today, yes, I acknowledge that I owe you $10.00, and I go home tonight and I look at my books and I find I was in error, I could certainly come down in the morning and tell you I don't owe you the ten dollars.

Mr. Kennedy: May I approach the Clerk, your Honor?

The Court: Yes, you may. It will be received. A matter of argument, which statement is correct.

(At this point defendants' Exhibit 34, previously marked for identification, was received in evidence.) [225]

Mr. Kennedy: I have some other exhibits marked, your Honor.

The Court: I wonder, Mr. Kennedy, I think the Sergeant can he be excused? You may be excused.

Mr. Kennedy: Possibly, to save time, your Honor, for the purpose of the record I am going to offer when it is marked copies of the complaints by Mr. and Mrs. Gilmont against Mr. McKinzie to recover damages for personal injuries out of the accident, together with appearances filed by Mr. Bosch for Mr. McKinzie. Perhaps we can enter into some stipulation and may not have to go into evidence.

Mr. Bosch: What might not go into evidence?

Mr. Kennedy: Do you wish to stipulate on it or do you wish me to offer it in evidence?

Mr. Bosch: What kind of a stipulation do you have in mind?

Mr. Kennedy: That the actions were filed pending the reservation rights.

Mr. Bosch: I can stipulate that you filed the actions. I don't deny it.

Mr. Kennedy: I'll just offer them, your Honor. I thought maybe we'd just save time. At this time defendants will offer Exhibit 35 which is a report of the driving record of Mr. McKinzie, from the Department of Motor Vehicles, dated February 27, 1958. Do you have any objection? [226]

(At this point defendants' Exhibit 35, report of driving record of Mr. McKinzie, was marked for identification.)

Mr. Bosch: If I recall, your Honor, we already have an exhibit just identical to this offered by the plaintiff.

Mr. Kennedy: That's the purpose of it, your Honor. It is materially different. They offered an abstract of record on an earlier date. This one indicates that his driver's license was not suspended on April 16, 1957. You have seen it before, counsel?

Mr. Bosch: I have no objection.

Mr. Kennedy: At this time defendants Gilmont will offer exhibits for identification 38, 39, 36, 37, 38, being a copy of a complaint by Robert Dean Gilmont vs. Arthur A. McKinzie, filed in the Circuit Court of the State of Oregon for the County of Lincoln, Exhibit 39 being a copy of a complaint filed by Rose M. Gilmont vs. Arthur A. McKinzie, County of Lincoln, Exhibit 36, being a motion filed by Mr. Bosch as the attorney for Mr. McKinzie in the same case in the Circuit Court of the State of Oregon for the County of Lincoln in the case of Rose M. Gilmont, and a motion in the case of Robert Dean Gilmont in the same county.

(At this point defendants' Exhibit 36, a motion, Exhibit 37, a motion, Exhibit 38, copy of a complaint, Exhibit 39, copy of a complaint, were marked for identification.) [227]

Mr. Bosch: If the Court please, I think that these exhibits might properly not be introduced in this case. If the Court will take these into consideration along with the proposed exhibit on behalf of the plaintiff on rebuttal, that is, the agreement of nonwaiver of rights. In other words, I expect these would be a matter for the Court as a question of law to determine. Perhaps it is not properly——

The Court: Yes, I don't see where there is any jury question involved.

Mr. Bosch: Of course, it's a matter of the construction of our——

The Court: Yes, I know it would be a legal question involved. We have certain legal questions to resolve after certain facts are resolved.

Mr. Bosch: I have no objection, your Honor, to admitting that there have been actions filed.

The Court: I think, checking through it, apparently the pre-trial order was subscribed to prior to the institution of these actions.

Mr. Kennedy: No.

Mr. Bosch: No.

Mr. Kennedy: They are listed as exhibits in there, your Honor.

The Court: On the other hand, the pre-trial order does not have an agreed fact, admitted fact, a fact that is. [228] Your agreed facts are that there was a collision, that the defendants Gilmont had retained an attorney, that the terms of the policy, plaintiff if obligated, claiming that the plain-

tiff is obligated to provide a defense for said defendant in any action that may be brought. Your pre-trial order you admit the facts are erroneous. They admit facts that did not exist. There have been actions filed. Oh, well, I take it you are offering these exhibits now?

Mr. Kennedy: I am, your Honor.

The Court: They will be received for the purpose of the legal issues involved and not the factual.

Mr. Kennedy: Very well.

The Court: Those were numbered? 35 through 39.

(At this point defendants' Exhibits 35 through 39, previously marked for identification were received in evidence.)

Mr. Kennedy: Defendants Gilmont rest, your Honor.

The Court: Thank you. Rebuttal?

Mr. Bosch: I wonder if we might have our morning recess while I check my files before I completely rest on rebuttal?

The Court: Yes, I'll give you that opportunity. You have some matters to take care of? [229]

Mr. Bosch: I was going to offer this one and going back to double check my file.

The Court: All right.

Mr. Kennedy: Your Honor, I have no objection to the admission of this with respect to the legal matters, as the Court outlined, but otherwise object as self-serving statements.

The Court: 18 will be received in connection with the legal matters therein involved only.

(At this point plaintiff's Exhibit 18, an agreement between Mayflower and McKinzie, previously marked for identification, was received in evidence.)

The Court: Members of the jury, take a short recess.

(Recess taken.)

(The following proceedings occurred in the presence of the jury.)

Mr. Bosch: There will be no rebuttal, your Honor.

(The following proceedings occurred outside the presence of the jury.)

The Court: Very well. I'd like to have some discussion from counsel as to what form of verdict should be submitted to the jury.

Mr. Kennedy: Excuse me, at this time I submit the requested instructions.

Mr. Bosch: Your Honor, I would like to move the Court at this time for a directed verdict. [230]

The Court: All right. I'll hear you in just a moment.

Mr. Bosch: Your Honor, at this time the plaintiff Mayflower Insurance Exchange moves the Court for a directed verdict against the defendant McKinzie individually and likewise makes the same motion for a directed verdict individually against the defendants Gilmont. The motion for a directed verdict, your Honor, by the plaintiff in this case is based upon these grounds, that on the contentions of the plaintiff in the pre-trial order it has been satisfactorily proved and there has been no evi-

dence to the contrary that the application was made by the defendant to the insurance company on April 16, 1957, that certain representations that he made to the company in that application were false, that these representations were material to the particular risk involved, that in reliance on these representations it is likewise uncontradicted in evidence that the company was induced to rely upon the representations and issued a policy.

We have cited the Court legal authority for the proposition that these are material and the company was entitled to rely on them and issue the policy to the defendant McKinzie.

Likewise the defendant Gilmonts' rights can rise no higher than the defendant McKinzie's. I think the Court has heretofore ruled on that matter. [231] Therefore we have a situation where all the necessary elements of the plaintiff's case in chief have been satisfactorily proved. There has been no evidence to the contrary as to misrepresentations in the policy and as to the matter of the defendants, your Honor. As I understand it the sole defense was left to the defendant after the arguments yesterday on the grounds of laches, and if I understand the testimony this morning and yesterday there has been no testimony or evidence put on before the Court to show any change of position or prejudice. So I would argue very strenuously that one defense has not been satisfactorily established to the Court.

In this case it is somewhat unique, of course, that McKinzie has not appeared for reasons best known

to himself, but in his own deposition which was taken here and which defendants Gilmonts' counsel had benefit of intending and interrogating and cross examining at some length by his own sworn testimony, he admitted he represented these facts not only as to ones we first discovered in investigating the accident, but to a number of others we found developed upon his deposition, and which were likewise relied here when we finally came to our pre-trial order. Some of those, of course, were discovered after we commenced the suit for declaratory judgment. But, it was his own sworn admission in falsifying his application. It is a situation where I think clearly the evidence has shown to the Court that there is no doubt this [232] policy would never have been issued in the first instance if the facts had been correctly represented, and that the company was entitled to rely on those representations in issuing the policy. They had no duty to go forward and make any independent investigation premised on the idea that the applicant was lying.

There was nothing in the application which would give anyone any indication that he was doing other than telling the truth. There was no qualification, no comment, no conditions or anything else which would in any way apprise the company they should make an independent investigation. The company went forward, issued the policy, and in due course found that the man had misrepresented to them something which, if they had known it in the beginning, they would never have contracted to do.

I see no fault upon the part of the company, and even if there is, there still is the element insofar as laches is concerned, there had been no showing, offering or pleading on the matter of prejudice to the defendants Gilmont or McKinzie that they had in any way been hurt.

Certainly, McKinzie could not take advantage of his own fraud and misrepresentation and lead the company into a situation of contract and then contend that just because they elect to stand on their rights he ought to have the benefit of his own fraud. As far as the defendants Gilmont are concerned, if they had been misled to their [233] prejudice, that might be something else. But, as I understand the evidence, there is no issue, there is no proof on that issue. I don't think, your Honor, in this particular case there is anything for the consideration of the jury. I don't see any other evidence.

I wonder if the Court has had the opportunity to read a few of those cases which were cited in my——

The Court: Trial brief — yes, I think I acquainted myself with all of them.

Mr. Bosch: There was a case of State Farm Mutual vs. West, a District Court case.

The Court: Yes.

Mr. Bosch: I invite the Court's attention to that particularly, because the facts were not dissimilar. Likewise, a case which was only published in the last week, Ott vs. Integrity Mutuals, in Wisconsin, 90 N.W. 2nd. Both of those cases, your Honor, the

Court had no trouble whatsoever finding that these particular representations were similar or almost identical to these here were material to the risk and that if the company had been properly advised——

The Court: As a matter of law.

Mr. Bosch: Well, in each case, your Honor, I must confess those cases were tried by the Court. So whether it was found as a matter of law or as a matter of fact is difficult to determine. [234]

The Court: I think it was a finding of the Court.

Mr. Bosch: I think so too, your Honor. Of course, that's what I am submitting here by this motion is that there is no contrary evidence, and that the Court should find, withdraw that issue from the jury and find as a matter of law. Is there any point upon which I have not covered which the Court is in doubt about?

The Court: I have none at the moment. I'll tell you, Mr. Kennedy, for the reasons that I shall give hereafter I feel that the case should go to the jury on the question of the claimed fraudulent representations primarily as to whether or not they were material. But I'll have to submit the whole issue. So, therefore, I'd like to hear from you on your affirmative defense of laches.

Mr. Kennedy: May I say just a word on the case as a whole in response to the directed verdict. It will be very brief.

The Court: I have told you my position with reference to the——

Mr. Kennedy: Very well. With respect, as I

understand it, the Court feels then they have the burden of proof. It's a jury question. It's a fact question. In addition to that it has been the position of the defendants Gilmont that they are seeking to rescind on the ground of fraud, that as a basic and fundamental element of the right to [235] rescind is the requirement that a person must act promptly upon the discovery of any fraud or any misrepresentation, and it has nothing to do with prejudice or anything else. It doesn't go into the question of laches. This hasn't anything to do with our intentions of affirmative defenses. It's a defense to their cause of action.

The Court: Under the general denial?

Mr. Kennedy: Under the general denial, correct, your Honor. I believe that when a person has knowledge of the facts which may give them a right to rescind or has been placed upon notice of certain facts which would, which should cause them to make further inquiry, they must act promptly to rescind. If there is any unreasonable delay then they cannot rescind but they can only sue for damages. In this particular case——

The Court: I won't subscribe to it on that theory.

Mr. Kennedy: Very well, your Honor. The question, as I understand it,—does the Court wish to hear me on any of our other contentions?

The Court: Your contention of laches.

Mr. Kennedy: On the question of laches, your Honor, I think there has been, I think the evidence shows sufficient facts to submit to the jury that there has been unreasonable delay. I think there

certainly is an inference from the evidence sufficient to submit to the jury that both Mr. McKinzie, [236] the insured, has been prejudiced from the standpoint of having the insurance company purport to represent him for approximately, well, from June up until almost October 1st. There has been the mere fact of delay it is prejudicial. There has been prejudice on the part of the defendants Gilmont in that again the mere fact the delay is prejudicial in a case of this kind.

I think that the Court, of course, will recognize that personal injury cases are handled by lawyers quite a bit differently in the case of insurance and no insurance. On the one hand, if you know there is not any insurance, you make proper inquiry to determine any assets of the defendant. To make sure any assets will not be transferred.

If you are led to believe that such, well, there is no evidence to support it, but if you have a case where there is insurance, where the company is negotiating with you, you explore the possibilities of settlement. If, after a period of some four months, there is denial or an attempt for rescission, I think the mere fact of the forbearance to sue or proceed with the case is certainly sufficient evidence of prejudice to submit that matter to the jury.

It's a question of whether reasonable minds would differ as to whether there has been unreasonable delay or prejudice. That, basically, your Honor, I think is the position of the defendants Gilmont. [237]

The Court: Thank you. Well, this is a hardship case. We have them, unfortunately, very often.

Now, as you and I drive down the highway and we see somebody approaching us, we don't know whether they have coverage or not. We have no vested right in the State of Oregon, no reason to believe that any other car on the highway is financially responsible for the harm that he might do. Our law seems to be that every dog is entitled to at least one bite. So, as I say, it's a hardship case. People sustain property damage and they have personal injuries, all to their damage. They thought when claims were asserted that that was financial responsibility in the form of public liability insurance. It then developed that the company having issued a purported policy, through its policies of its own, not for me to say whether they are good public relations or bad public relations. They asserted their legal right just the same as any individual can assume a legal right. They claim that they were fraudulently induced to enter into this contract of insurance and grant their financial support to the defendant McKinzie. A legal right for them to assert, and if they were fraudulently induced, the law should protect them. It's too bad that innocent third parties should be affected by the wrongdoing of McKinzie these many months ago. If they weren't fraudulently protected, why then McKinzie should have the benefit of that [238] which he paid for and the defendant Gilmont should have the benefit of the resulting effect of having that financial responsibility behind them.

I can well understand that in order to secure the benefit of that financial responsibility the defendant Gilmont, of course, would grasp for every straw that there is to hold the insurance company in the picture. Now the Court has weeded out this proposition of negligently investigating the accident and failing to do so, or failing to do that. It is not for the defendant Gilmonts to say how the insurance company should conduct its investigation. They have the burden first of all of showing that McKinzie was at fault, that his fault was the proximate cause of the damage. If they—the law giving the benefit of going against any insurer if insurer there be.

So Gilmont is not in a position of standing, or the contractual relationship with the defendant, or the plaintiff in this case, they are in no position to assert any particular legal right in connection with the investigation.

The Court did bear with them with their theory of laches, and we have a case that arose in this very Court, this District, in which an insurance company blew hot and cold, and during that period of vacillation the so-called beneficiary of the insurance company's position was changed and he suffered a change of position. And then for the insurance company to say, well, now, blow cold, the Court said no. You have changed the position to the prejudice of these people. From here on you are going to blow hot.

Now I am willing to bear with the defendant Gilmont that there may possibly be sufficient evi-

dence to go to the jury on the question of laches in this unorthodox way of trying to get a dollar through the Secretary of State's office. Now assuming for the sake of argument that we can say that that was a vacillation, blowing hot and cold, in a matter of right, assuming that the adjuster did tell these people, we will hold off filing the suit for a while, it will work out, or words to that effect, assuming further he had authority to bind the company to that, this Court has listened attentively to the evidence and there is not one iota of evidence that these, the family, defendant Gilmonts position had been changed to their detriment by reason of such delay in filing the action. None whatsoever.

If counsel has suggested by reason of that delay that McKinzie was able to secrete his assets, then I certainly would go with that theory. As I say, it's a hardship case, and however it's a land of law and not of men. I am forced to remove from the jury the question of laches, but it will go to the jury on the question of fraudulent representations in the first part, which is conceded to be the test in Oregon by both parties. [240]

Secondly, whether or not one or more of those representations were material to the risk, and I shall give to you, this is going to be in the way of paraphrase, but I think their advice, counsel, in connection with their argument that this is what I have adopted and will instruct the jury as a test of the representation material to the risk.

A fact is material to the risk when, if known to

the underwriter, it would have reasonably caused or influenced him when acting in accordance with the usual custom of insurers to refuse the risk or would have reason for his demanding a higher premium. Now I take that to be a classical description of a representation material to the risk.

Now does the plaintiff have any requested instructions?

Mr. Bosch: Yes, your Honor.

Mr. Kennedy: No, your Honor. I'm sorry I misunderstood your Honor. May I inquire, are you going to submit to the jury part of the elements of actionable fraud?

The Court: Oh, yes, classical five or six elements, whatever you call them.

Mr. Kennedy: Thank you, your Honor.

Mr. Bosch: Your Honor, I hate to, will the Court permit me to remark on one other piece of evidence in this case?

The Court: Yes. [241]

Mr. Bosch: With regard to materiality. This manual was introduced at the request of the defendants concerning the instructions given to the agents, and on the second page of those instructions it's under the list of ineligible or prohibited risks. It says, revocation of license within three years. No agent, and certainly no underwriter of the agent, could, under the company's policy and under their specific instructions, have written this particular policy with that suspension of revocation. The suspension of revocation is not in dispute in this case. If that be made known by the

applicant, then I think there is no doubt under the instructions which this particular company gave to its agents in the underwriting department that the company would have no choice, it wouldn't have considered it one way or the other. They would have rejected the risk.

To me, I therefore can't see where there is an issue of fact to be submitted to the jury.

The Court: Well, supposing for the sake of argument they had said, you will not issue a license or prohibited from issuing a policy that the man smoked black cigars.

Mr. Bosch: I think that the difference between black cigars and a suspension of a driver's license is a matter which a Court can find.

The Court: That's the very reason why the Courts have universally adopted this position when acting in accordance with usual custom. [242]

Mr. Bosch: Well, this Court cannot find then as a matter of law that makes the matter as far as I am concerned——

The Court: That's right. To say it's a perfectly reasonable requirement.

Mr. Bosch: Thank you.

The Court: It's a closed question. I'll agree with you, but I can't say as a matter of law.

Mr. Kennedy: Do you want us to proceed now, your Honor, or did you want us back——

The Court: I wanted to resolve these requested instructions if I could. I think you better call the jury and we'll send them out while we resolve these.

(The following proceedings occurred in the presence of the jury.)

The Court: Members of the jury, all of the parties have indicated that they have completed the submission of evidence in the case. I see it is right at 11:30, and the Court and counsel have the chore of settling instructions in the matter, and rather than to keep you upstairs you may be excused until 2:00 o'clock this afternoon. Recall the admonition of the Court. 2:00 o'clock this afternoon, and immediately go into arguments and instructions. 2:00 o'clock, please.

(Discussion between Court and counsel regarding requested instructions.) [243]

(Noon recess.)

Afternoon Session

(At 2:00 o'clock p.m., Court reconvened proceedings pursuant to noon adjournment.)

(The following proceedings occurred in the presence of the jury.)

Mr. Kennedy: If the Court please, Mr. Pihl has to be in the State Court today at 2:00 o'clock and he wanted me to ask the Court to excuse him and excuse his presence here.

The Court: Does the plaintiff have a suggested form of verdict?

Mr. Bosch: (Nodding head.)

The Court: Consenting to go on the general——

Mr. Bosch: Yes, your Honor.

The Court: Thank you. Plaintiff's opening argument.

(Arguments.)

The Court: Members of the jury, as you all know, this trial has now progressed to the stage and a point where it becomes the duty and the privilege of the Court to advise with you and to instruct you as to the law involving the controversy we have before us, and which shall guide you throughout your entire deliberations of the questions of fact and the controversy in issue that shall be submitted to you under the status of the evidence pursuant to these instructions.

Now bear in mind, members of the jury, as such a trial jury, you are the sole and exclusive judges of all of the facts in controversy. [245] And the Court has no right or prerogative, in fact it's unlawful for it to in anywise influence you in your ultimate determination of the facts.

However, the Court is here for the purpose of advising with you primarily as to the law and under proper conditions and circumstances to advise with you concerning the status of the evidence.

Now bear in mind that if during the course of this trial the Court has, or during the instructions you gain some impression as to how the Court might feel with reference to a fact in controversy, disgorge that from your minds. But if during the course of these instructions the Court should make some comment concerning the evidence, bear in mind that that is purely advisory to you. You give it such weight as you deem that it is entitled to.

But do not let it influence and effect your decision and ultimate verdict to the extent that you adopt the suggestions or advice of the Court over and above your own judgment concerning the matter. It is purely advisory. Give it such weight as you deem that it is entitled to.

For the same token it is the Court's prerogative to advise you as to the law. Therefore, it is your duty to accept the law concerning the matter as given to you by the Court and not to substitute therefor what you think the law should be or what you think the law is. [246] If you think the law is harsh in one instance or lenient in another instance, you cannot substitute your own judgment. The law is made for you and me, and all of us must follow it. It is incumbent under your oath to follow the law in weighing the evidence.

The statements of counsel during the course of trial are their arguments in the summation of the evidence and their theories of the controversies are advanced to you as not evidence in the case. You cannot consider the same as evidence, but give their arguments such weight as you deem they are entitled to in helping you to analyze the evidence and to aid you if you find that it does in arriving at a true and a just verdict between these parties according to the evidence and the law as given to you.

In addition to the evidence that has been submitted and which you shall determine the truth of the matter from the conflict of the evidence, there are certain facts that have been admitted or

agreed to by the parties in their pre-trial order. And they are binding upon us. I shalll read to you these facts which are agreed upon between the parties, which you shall consider as binding upon you, in addition to the status as you shall find the conflicting evidence ultimately resolves itself.

It is admitted by the parties that the plaintiff, Mayflower Insurance Exchange,—first of all, [247] members of the jury, I want to call your attention to the fact that the parties to this action as they now stand before us are, the Mayflower Insurance Exchange, the plaintiff, and I shall refer to this party hereafter as the plaintiff. The defendants in the action are: a William Allen McKinzie, who has not appeared in this Court. And the remainder of the defendants are: Robert Dean Gilmont, Rose Marie Gilmont, who have been present in the courtroom, and Susan Rose Gilmont, a minor child, Robert Russell Gilmont, a minor child, and Norman I. Gilmont, a minor child, who have not appeared physically in the courtroom, but they have appeared legally in the courtroom through their guardian ad litem, a Robert A. Watson, an attorney of this city who appeared the first day and then was excused by the Court.

Now members of the jury, the defendant McKinzie had the right to appear here if he wished to, and he had the right to remain absent if he wished to. You should give that no particular consideration as between these parties, and I shall instruct you a little bit later as to the relationship

between the parties Gilmont and the defendant McKinzie.

As far as this action is concerned, I will merely refer to the defendant Gilmont as the defendant, and if there is an occasion to refer to McKinzie, I shall refer to him as McKinzie. [248]

Now the parties, the plaintiff and the defendant, have admitted in their pre-trial order, have agreed to and admitted the following facts:

That the plaintiff is an unincorporated association organized under the laws of the State of Washington, and is the reciprocal and inter-insurance exchange, and is authorized by the laws of the State of Washington to be sued and to sue in its own name. The defendant McKinzie is a citizen of either the State of Oregon or the State of California, and the defendants Gilmont are citizens of the State of Oregon if the matter in controversy exceeds $3,000.00.

The defendants' minor children of the guardian ad litem that's been appointed for the minor children has appeared. That on or about April the 16th, 1957, the plaintiff issued a certain policy of insurance to McKinzie, which insured, being McKinzie, against public liability for personal injuries and property damage arising out of the operation of his 1951 Cadillac coupe automobile with certain limits of which we are not interested.

On or about the 8th day of June, '57, near Toledo, Oregon, McKinzie, while operating his mentioned automobile, which was insured by the policy, was involved in a collision with an automobile owned

and operated by the defendant, Robert Gilmont. The collision resulted in personal injuries to all of the defendants Gilmonts and damage to the automobile owned by [249] the defendant Arthur McKinzie. And the defendant Robert Gilmont.

Further, that the defendant Gilmont had retained an attorney, and was demanding that the defendant McKinzie and the plaintiff respond in damages to their injury, under the policy. And there follows legal matters of which the jury has no concern.

Now it's the contention of the plaintiff that under the admitted facts and under its theory of the evidence as produced in the Court on its behalf and the contradictory evidence on behalf of the defendant that at the time McKinzie made application for the policy of the insurance that was issued and that subsequent to the receipt of the application and in reliance upon the statements and representations made therein, the plaintiff issued to McKinzie the mentioned automobile insurance policy.

Then the plaintiff further contends that certain statements and representations made by McKinzie in his application for the insurance policy were false, in that on April the 16th, 1957, the defendant McKinzie made the following answers to the following questions put to him by the said application:

Question 1—Have you or any driver of this car, subsection "a", any physical impairment?

And the answer elicited was: No. [250]

That's the answer of McKinzie, according to the contention of the plaintiff.

"b" Had auto insurance cancelled or refused?

The answer elicited from McKinzie was: No.

"c" Has license revoked or suspended?

The answer elicited from McKinzie is: No.

"d" Received any driving charges, citations or fines (not parking) in past three years?

The answer given by McKinzie: No.

"e" Been involved in any auto accident as a driver in the past three years?

The answer given: No.

Question 2—Name of previous insurer.

Answer given: None.

The plaintiff goes on to further contend, whereas in truth and fact defendant McKinzie's driving privilege had been suspended by the Department of Motor Vehicles of the State of Oregon, which suspension was in effect on April 16, 1957, that defendant McKinzie had received various driving charges, citations or fines (not parking) in the three years prior to April 16, 1957, that defendant McKinzie had been involved in an auto accident as a driver within three years prior to April 16, 1957, that the defendant McKinzie did have various insurers who had issued to him automobile insurance liability insurance policies prior to [251] April 16, 1957.

The plaintiff further contends that it would not have issued its automobile liability insurance policy to defendant McKinzie had it known the true state of facts, and if the defendant McKinzie had truthfully and correctly answered the questions put to him on said application. Whereupon, the plaintiff

has asked certain legal relief as shall be determined from the factual situation as determined by this jury.

As part of its contentions, the plaintiff generally and specifically denies all of the contentions of the defendant Gilmont, which I shall call to your attention.

Now the contentions of the defendant Gilmont, which will be submitted to you, are:

First, that it denies generally and specifically each and all of the contentions given to you and read to you and submitted to you under these instructions as asserted by the plaintiff, that is, denies the falsity of the claimed answers and it denies that they were given fraudulently, and in effect denies all of the contentions which I gave to you. And then further asserts that the plaintiff was careless and negligent in obtaining and completing the application of insurance from the defendant McKinzie, and therefore the defendant contends for a legal matter that they cannot now take advantage of any fraud which may have [252] been committed by Mr. McKinzie, which they deny was committed.

Now members of the jury, resolving from these contentions, you have in effect two issues to determine. The first issue is whether or not one or more of these alleged answers given by McKinzie was false. If so, whether or not such false representation or representations were made fraudulently with the intent to deceive the plaintiff. And if you find, and the next paragraph of that issue is,

whether or not if those were fraudulent representations, whether or not they were material insofar as the plaintiff was concerned.

Now instructing you specifically as to this first issue, the Court wants to call to your attention that the Gilmonts are herein parties to this lawsuit because they claim some rights against the plaintiff insurance company through McKinzie. They are not a party to the insurance contract. Therefore, any right that they have must be asserted through McKinzie. And in this connection you are instructed that the defendants Gilmont have no greater rights in and to the coverage afforded, if any, by the policy, and any per cent which the plaintiff has against the defendant McKinzie are likewise applicable to the defendants Gilmont.

In other words, the defendants Gilmonts' rights, if any, are derivative and cannot be greater or better nor less than the rights, if any, of the defendant McKinzie against the insurance concern. Therefore, this lawsuit between these [253] parties present must be determined upon the transactions had between the plaintiff insurance company and the one McKinzie prior to the accident referred to in the admitted facts and the evidence.

So in considering this issue, one, which is submitted to you, you cannot consider the fact that there was an accident or that any person was injured. You must reach a determination without regard to the fact that there was an accident of any nature. Because these alleged transactions had

between the plaintiff and the defendant McKinzie and their respective rights in connection with this policy of insurance must be determined by the facts as you shall find that they existed prior to any date or any accident, date of any accident.

In connection with the portion of the law of the State of Oregon and in connection with plaintiff's charge that McKinzie made certain statements or representations in his application for insurance which were false, you are instructed that all matters which are stated in an application for insurance are to be considered by you as representations and not as warranties, and the mere fact that any statement or answer in the application may have been incorrect is not in and of itself sufficient to entitle the plaintiff to rescind or be relieved of its obligation under the insurance policy.

You are instructed that mere falsity, if any, contained [254] in the application is not sufficient to annul the policy of insurance, as I told you. Any such representation, if any, must have been not only false but fraudulently with the intent to deceive. And furthermore, material to the risk, to be either accepted or rejected by the plaintiff insurance company upon the application.

You are instructed that the general proposition of dealing among men that fraud is never presumed and it must be established by evidence which is clear, satisfactory and convincing. There is a presumption which is reasonable in ordinary dealings that a person is innocent of a crime or wrong and the private transactions may have been fair and

regular. Therefore, we say it must take clear and convincing proof to show that the transactions were not regular but were fraudulent with intent to deceive.

Therefore, in determining whether or not any one or more of the claimed representations were false and fraudulent, you are instructed that the plaintiff has the burden of proving all of the elements of fraud. You must find by a preponderance of all of the evidence in the case that, first, McKinzie made the representations, or at least one or more of them as claimed.

Second, that any such representation or representations were false, and that they were material to the risk representations. [255]

Further, that any such representations were made by, if made by McKinzie, were with the knowledge on the part of McKinzie that the representations were false or that he made such representations recklessly and without regard to their truth or falsity.

You must further find that McKinzie made those representations, one or more of those representations, if any, for the purpose of deceiving the plaintiff, and that they were made for the purpose of inducing the plaintiff to act upon them.

Then you must further find as a further element that the plaintiff was ignorant of the falsity, if any, of any representations. And that the plaintiff actually relied upon those representations, and that he was, that is, the plaintiff, was acting as an ordi-

nary prudent, careful insurance company was entitled to rely upon any such representation.

Then if you find all of those facts, one remaining fact which you must find is, that when I say rely upon those representations, I mean, of course, relying on them to the extent that it causes the insurance company to issue its policy.

The last remaining element, that the plaintiff suffered damage because of the false and fraudulent representation, if any. [256]

So you are instructed that all of these elements must exist before you can find that there was fraud in this case to the extent as contended by the plaintiff and to entitle it to a verdict at your hands. The absence of any one of these elements given to you is fatal to the finding of the fraud or recovery by the plaintiff.

Now the Court has used the expression, "material to the risk". The definition of this phrase or expression merely means that a fact or a representation of a fact is material to the risk when, if known to the underwriter or the insured, when if known to the underwriter it would have reasonably caused or influenced him to refuse the risk or it would have been a reason for his demanding a higher premium if he accepted the risk.

The plaintiff further contends, as called to your attention, that McKinzie denied that he had received any driving charges, citations or fines within the three years prior to the date of his application. Whereas the plaintiff contends that in fact he had received three driving citations from the State of

California and one in the State of Oregon during said period.

Your attention is called to the fact that the evidence on behalf of the plaintiff as to the citations in the State of California stands unrefuted by the evidence on behalf of the defendants. In consideration with the so-called citations [257] in California, you are instructed that there has been introduced into evidence a certified copy of various driving citations, which the defendant McKinzie received in the State of California within three years prior to the time he made his application for insurance. These are identified as plaintiff's Exhibits 19-b, 19-c and 19-d.

Now these exhibits do not refer to the citations of the alleged offense in a common term, such as speeding or violation of the basic law, as many of the citations you know do. They merely refer to code numbers, so as you may not know as to what the law of California is and as to what type these violations were, I call your attention to the following code sections referred to in the exhibit.

Plaintiff's Exhibit 19-b reveals that defendant McKinzie was charged with violation Sec. 577 of the vehicle code of the State of California, of which this Court takes judicial knowledge, and you are instructed that the provisions of such Sec. 577 reads as follows:

Whenever a flashing red or yellow signal is used as a traffic sign or signal, it shall require obedience by vehicular traffic for traffic as follows:

Flashing red, stop signal. When a red lens is

illuminated by rapid intermittent flashes, drivers of vehicles shall stop before entering the nearest crosswalk at an intersection or at a limit line when marked, and the [258] right to proceed shall be subject to the rules applicable after making the stop at a stop sign.

Flashing yellow: When a yellow lens is intermittently with rapid intermitten flashes, drivers of vehicles may proceed through an intersection or pass said signal only with caution.

That is the law that the citation revealed that the defendant McKinzie was cited for, violation for.

And Plaintiff's Exhibits 19-c and 19-d showed the defendant McKinzie on two occasions violated Secs. 510 and 511 of the vehicle code of the State of California, which this Court likewise takes judicial notice, and you are instructed that the provisions of these sections, 510 and 511, are as follows:

510 is designated as the basic speed law, and it provides:

No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent, having due regard for said traffic thereon, surface and width of the highway, and in no event at a speed which endangers the safety of persons or property.

511, of which I shall paraphrase for you, and it merely designates certain speeds within certain areas. Designating a designated speed for one area, such as school buildings. Another designation, setting aside an [259] area with a designated speed of twenty-five miles an hour in business and resi-

dential sections. And then follows a designated speed of fifty-five miles per hour in other types of, in all other areas, unless a different speed is especially designated in this code.

Now these designated speeds are merely, are not speed limits as such ordinarily referred to, but are merely indicated speeds, a violation of which is merely a prima facie violation of the basic rule as read to you unless other facts show that it was reasonable and prudent to drive at a faster speed in those designated areas. Those being the traffic laws of which the defendant McKinzie was cited as having disobeyed in connection with those exhibits.

Now members of the jury, there is a second issue which is raised by the contention of the defendants Gilmont as to whether or not the agent at the time he took the answers from McKinzie acted with ordinary, reasonable care for the protection of his own company, and in that connection you are charged that the defendants Gilmont have charged that the plaintiff, acting through the agent who took the application, was careless and negligent in obtaining and completing the application of insurance from McKinzie.

You are instructed, members of the jury, that negligence as ordinarily defined, is a failure to do that which an ordinary, reasonable prudent person would do under the same [260] or similar circumstances, or doing that which an ordinarily reasonable prudent person would not do under the same or similar circumstances.

Therefore, if you should find from the evidence that the plaintiff, acting through its agent, was careless and did not act as a reasonably prudent person, being an insurance company, in obtaining the answers from McKinzie while filling out the application for insurance by Mr. McKinzie, and thereby blindly or recklessly put down defendant's answers to the questions without reasonable credulence, you should then find that the plaintiff is not entitled to be relieved of obligation under its policy because then through such action and conduct he would have been, become a party to the transaction.

However, if you find that the plaintiff's agent while taking down the answers acted reasonably in accepting the answers given to him by McKinzie, then McKinzie is bound by his own doings as you shall find them from all of the evidence in the case subject to these instructions.

Now, members of the jury, the party having an affirmative of an issue in any lawsuit has the burden of proof, and by burden of proof we merely mean that such a party has the burden of proving his contentions by a preponderance of all of the satisfactory evidence in the case. And by preponderance of evidence I have used the expression [261] preponderance of evidence, and by preponderance of evidence we merely mean the greater weight of the evidence or that quantum of the evidence when fully and fairly considered and weighed produces upon the reasonable and impartial mind the stronger impressions and is more convincing

of its truth in the evidence in opposition thereto. In other words, the party having the burden of proof must make out the better and most reasonable case in light of all of the evidence in the case.

So it follows, members of the jury, that if you should find from all of the evidence in the case that defendant McKinzie did not give one or more false answers in his application, or you should further find that one or more of said answers were false but they were not made fraudulently with the intent to deceive, or that if any such answers were fraudulently made, that they were not material to any of the risks as you have been instructed. Then that would end the lawsuit and your verdict would have to be for the defendants.

If, on the other hand, you should find from the preponderance of all of the evidence in the case that the defendant McKinzie made one or more false and fraudulent answers to the questions in the questionnaire, as contended by the plaintiff, and you further find that any one or more of such false answers was made fraudulently with the intent to deceive the plaintiff, and further, that the plaintiff, [262] that such representations were material to the risk and that the plaintiff relied thereon, and did not know or had no reason to believe to know, acting as a reasonably prudent person that they were false, and they acted to their damage upon those false and fraudulent representations, if any, then you are instructed it would be your duty to return into Court a verdict in favor of the plaintiff.

So members of the jury, throughout your entire

deliberations upon the questions of fact in this case, in your determination of the liability or the non-liability on the part of the plaintiff under its policy of insurance, which it claims it is relieved from by reason of these alleged false and fraudulent representations causing it to act to its damage, you must not be influenced in any manner by sympathy or prejudice or bias of any kind. And your verdict must be based upon a calm and orderly and a judicious consideration of all of the facts in the case without reference to the status of the parties, subject to these instructions.

Members of the jury, every witness is presumed to speak the truth. However, this presuming may be overcome in the manner in which the witness testified, by his motives, and by evidence affecting his character or by contradictory evidence.

And you may also take into consideration in evaluating and determining what credence to give, credibility you desire [263] to give to the testimony of any witness, you may take into consideration what interest, if any, that witness may have in the outcome of your verdict.

A witness willfully false in one part of his testimony must be distrusted by you in the other parts of his testimony.

Evidence as such is to be estimated not only by its own intrinsic weight but also according to the evidence which it is within the power of one side to produce and of the other to contradict.

Therefore, if less or weaker evidence is offered when it appears that stronger and more satisfac-

tory evidence was within the power of the party to produce, such evidence as offered should be viewed by you with distrust.

When you retire to the jury room you should elect from one of your numbers a foreman to act as your chairman to guide you throughout your deliberations. Bear in mind, members of the jury, that your ultimate verdict in this case must be the unanimous conclusion of the twelve members of your jury.

You will be supplied with two forms of jury verdict. The first verdict in my hand carries the caption and title of the case, and reads:

We the jury, members of the jury duly impaneled and sworn to try the above-entitled cause, do find our verdict in favor of the plaintiff. [264]

If this be your verdict, cause your foreman to date it and sign it and return it into Court.

The next form of verdict, bearing the title and the cause:

We the jury, duly impaneled and sworn to try the above-entitled cause, return our verdict in favor of the defendant Gilmont.

Then a date line. If this be your verdict, cause your foreman to sign it, date it and return it into Court. Does counsel desire conference with the Court before submitting it?

Mr. Bosch: No, your Honor.

Mr. Kennedy: No, your Honor.

(The following proceedings occurred out of the presence of the jury.)

The Court: Plaintiff's exceptions.

Mr. Vosburg: Just for a matter of information, your Honor, as I understand it, we don't take exceptions here. We object to the instructions. Am I correct in that, your Honor?

The Court: Well, I think the word is exception.

Mr. Vosburg: I'll use them both, your Honor.

The Court: 51 is the rule. Why don't you use both?

Mr. Vosburg: I'll use them both, your Honor.

The Court: Let's see what the rule says. [265] You can act accordingly. Instructions to the jury: The word seems to be object. No party may assign error in giving, the giving or the failure to give an instruction unless he objects thereto prior to, before the jury retires. So you are technically correct. Objects.

Mr. Vosburg: Out of an abundance of precaution, your Honor, the plaintiff will object to and take exceptions to the instructions of the Court in the following particulars:

We object and except to the failure of the Court to give the plaintiff's requested instructions.

The Court: Which one is that?

Mr. Vosburg: Your Honor, I don't believe you have given any of ours.

The Court: Well, there is one I gave part of, but not in your form. Number 1, defendant failed to truthfully disclose his answers to the questions. I think that was covered. I didn't give it in your form. But I think it was covered.

Number 2 was taken from the jury.

Number 3 was taken from the jury.

Number 4 was taken from the jury.
Number 5 was taken from the jury.
Number 6 was taken from the jury.
Number 7 was taken from the jury.

You conceded that number 10 was covered by defendants' instruction. [266] And I refused to give defendants' number 11. You may have your objections.

Mr. Vosburg: May I call your Honor's attention when you say they were taken from the jury, our instructions, I think 2, 3, 4 and 5, those are the ones which your Honor has ruled here during the course of argument there was no evidence to sustain the submission to the jury. I don't think your Honor specifically has withdrawn them from the jury except by inference, and the reason I am calling this to your Honor's attention is, there has been introduced as evidence, and I assume will be submitted to the jury, this amended and supplemental answer of the defendants which sets out all of these other so-called alleged defenses, which you have withdrawn. I just call that to your Honor's attention. The jury may be misled.

The Court: I'll instruct the jury as to that. Those are being received for one purpose.

Mr. Vosburg: In addition, your Honor, the plaintiff takes exception to and objects to all that portion of the Court's instructions to the jury wherein the Court set forth the element of fraud and instructed the jury that the plaintiff must prove each and every element in order to entitle it to recover.

First, I think, your Honor, I may not be in exact order, but you talked about a material rep-

resentation, falsity. They must know it was false. [267] It was made with the intent to deceive. And that the plaintiff must not have known that it was false. He must have relied on it. He must be entitled to, they must have found he must be entitled to rely on it. Then your Honor instructed they must find it must be material to the risk.

Those instructions, your Honor, ran, those statements ran entirely throughout your instructions, and the point that we wish to object to and take exception to, your Honor, is that there was no basis for submitting these to the jury.

It is our contention that each and every one of the facts of which your Honor instructed the jury has been conclusively presumed by the evidence, and that there is no evidence to be submitted to the jury.

I appreciate, your Honor, that this is merely in another way paraphrasing our motion for a directed verdict, but in order that there may be no question about the matter, we do make the point in objecting to all of those instructions on the basis that there is no evidence that the jury could find to the converse of those because the fact, facts, and unquestionably show that those, all of those facts were present and that therefore there is no issue to be submitted to the jury on those particular factors.

In other words, the evidence conclusively shows that actionable fraud was committed, and that the plaintiff was entitled as a matter of law to recover in this particular case, [268] or to be specific, to rescind the contract.

The plaintiff also wishes to take exception and objects to the submission to the jury and in the instructions to the jury on the ground that the agent who took this application, the question of whether he was negligent and careless in obtaining the application—the point that we wish to point out to your Honor and object to and take exception to, is that there is no duty in the first instance or any obligation which would permit the question of negligence or lack of negligence to be submitted to the jury. And secondly, that even if that were a proper issue in this case, that the evidence conclusively shows that due care was used.

There is not a scintilla of evidence or any facts whatsoever to permit the jury in this particular case to define, to find that the plaintiff or its agents did not use due care and diligence.

Therefore, it is a submission of the question of fact first of which there is no issue, and second, if there was an issue, that it is conclusively shown that the plaintiff did comply with all of the requirements of law.

The plaintiff takes exception to, objects to those portions of the Court's instructions in which the Court mentioned a burden of proof, and stated that the burden of proof to proving all of these elements of fraud was on the plaintiff. This is a reiteration of our motion for directed verdict, [269] and our theory and the point we wish to call to the attention of the Court is, that there is no evidence that the evidence conclusively shows that we are entitled to recover. We have fulfilled all the burden of proof, and therefore that the jury should not

have been instructed that the burden of proof is on us because all elements have been complied with and of course a directed verdict in favor of the plaintiff.

I believe that's all of our exceptions.

The Court: You may have your exceptions.

Mr. Kennedy: No exceptions, your Honor. I do have an inquiry.

The Court: Yes?

Mr. Kennedy: Is your Honor going to merely instruct the jury that the answer and the amended answer and supplement, that the amended and supplemental answer are being given to them only for the purpose of possible admission?

The Court: Yes.

Mr. Bosch: Might I suggest it might ease the thing at this stage, we would have no objection to withdrawing it for whatever it was put in for. I may have made my offer, and it's in and I appreciate I am bound, and I can't withdraw it now. But if that would help, I would withdraw that answer now.

The Court: What's the defendant's position?

Mr. Kennedy: I'm a little bit concerned because counsel [270] explained in detail when he was offering it what it was being offered for. And I'm afraid the jury might be, well, we'll withdraw both of them. We will agree to withdraw both of them.

The Court: I will instruct the jury to disregard any comment about it.

Mr. Kennedy: I would just as soon.

The Court: Leave it alone. Very well.

Mr. Vosburg: Through inadvertence I neglected

to make one exception and objection. Might I have another opportunity?

The Court: Yes, you may.

Mr. Vosburg: Your Honor, you instructed the jury in effect that the fact that defendant McKinzie did not appear in this case was of no significance and should not be considered by the jury.

The plaintiff objects to, or takes exception to that instruction on the ground that it is not a correct proposition of law, that I think the fact that the defendant McKinzie did not appear is admission in this case, should be considered by the jury, and the fact that the defendant McKinzie has not appeared or made no appearance in this case, that therefore the defendants Gilmonts have no standing in this Court, and that therefore the instruction that it had no, the fact that McKinzie was not, did not appear and had no significance, is not a true statement of fact because according to our contention his absence precludes the Gilmonts from recovering in this case. [271]

The Court: I understand your position in this matter about it. I'll restate my position about it. As far as I know the interests of the defendants Gilmonts and the defendant McKinzie are adverse. For all I know, maybe he is staying away purposely. Their respective rights being adverse, they are not standing in privity to each other. This is a controversy being purchased here between plaintiff and the defendants Gilmonts. That's my position. Call the jury.

(The following proceedings occurred in the presence of the Jury.)

The Court: You may retire to the custody of the bailiff for your determination of the verdict. We will recess for it, awaiting the verdict of the jury, and I'll say to counsel, I'll ask you to hold yourselves available for further proceedings if necessary in the proceedings, and the return of the verdict, and if you voluntarily absent yourself, be deemed a waiver of your right to be present. I'll say one thing further, that if you wish to leave you may do so, and if you will leave your name, we will call you, but we won't wait more than ten minutes for you. Because it isn't fair to the jury.

(At 3:55 o'clock p.m., Court adjourned.)

[Endorsed]: Filed February 25, 1959.

[Endorsed]: No. 16394. United States Court of Appeals for the Ninth Circuit. Mayflower Insurance Exchange, Appellant, vs. Robert Dean Gilmont, Rose Marie Gilmont and Ronald A. Watson, Guardian ad Litem for Susan Rose Gilmont, a minor, Robert Russell Gilmont, a minor and Norman I. Gilmont, a minor, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed and Docketed: March 7, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 16394

MAYFLOWER INSURANCE EXCHANGE,
Appellant,

vs.

ARTHUR ALLEN McKINZIE, ROBERT DEAN GILMONT, ROSE MARIE GILMONT, and SUSAN ROSE GILMONT, a minor, ROBERT RUSSELL GILMONT, a minor, and NORMAN I. GILMONT, a minor, by RONALD A. WATSON, Guardian ad Litem for said minors, Appellees.

APPELLANT'S DESIGNATION AND ADOPTION OF STATEMENT OF POINTS AND DESIGNATION OF RECORD

Comes now appellant Mayflower Insurance Exchange and designates and adopts as its statement of points upon which it will rely the statement of points appearing in the typewritten record on file herein, and further designates and adopts as its designation of record, the designation of record appearing in the typewritten record on file herein.

/s/ ARTHUR S. VOSBURG,
/s/ FRANK M. K. BOSCH,
Of Attorneys for Appellant, Mayflower Insurance Exchange.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 13, 1959. Paul P. O'Brien, Clerk.

No. 16395

In the United States Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

J. I. MORGAN AND FRANCES MORGAN, RESPONDENTS

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE PETITIONER

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In the United States Court of Appeals for the Ninth Circuit

No. 16395

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BRIEF FOR THE PETITIONER

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 5-35) are reported at 30 T.C. 881.

JURISDICTION

The petition for review (R. 50-57) involves federal income tax for the years 1950, 1951, 1952, 1953 and 1954. On December 22, 1955, the Commissioner of Internal Revenue issued a notice of deficiency. (R. 37.) Within ninety days thereafter and on March 12, 1956, the taxpayers filed a petition with

the Tax Court for a redetermination of the deficiency under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3.) The decision of the Tax Court was entered September 23, 1958. (R. 49.) The case is brought to this Court by petition for review filed December 11, 1958. (R. 57.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether, as the Commissioner contends, the annual interest increment in cash value of an "accumulative investment certificate" owned by taxpayer reporting income on an accrual basis is taxable as ordinary income each year or whether, as the Tax Court held, Section 117(f) of the 1939 Code and Section 1232(a)(1) of the 1954 Code require that the interest increment in the cash value be taxable only as capital gains upon retirement of the certificate at maturity.

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 22. GROSS INCOME.
>
> (a) [as amended by Section 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of

any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117 [As amended by Section 150(a)(1) of the Revenue Act of 1942, c. 619, 56 Stat. 798, and Section 322(c)(2) of the Revenue Act of 1951, c. 521, 65 Stat. 452]. CAPITAL GAINS AND LOSSES.

(a) *Definitions.*—As used in this chapter—

* * * *

(4) *Long-term capital gain.* — The term "long-term capital gain" means gain from the sale or exchange of a capital asset held for more than 6 months, if and to the extent such gain is taken into account in computing gross income;

* * * *

(f) *Retirement of Bonds, Etc.*—For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in

registered form, shall be considered as amounts received in exchange therefor.

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

Internal Revenue Code of 1954:

SEC. 1232. BONDS AND OTHER EVIDENCES OF INDEBTEDNESS.

(a) *General Rule.*—For purposes of this subtitle, in the case of bonds, debentures, notes or certificates or other evidences of indebtedness, which are capital assets in the hands of the taxpayer, and which are issued by any corporation, or government or political subdivision thereof—

(1) *Retirement.*—Amounts received by the holder on retirement of such bonds or other evidences of indebtedness shall be considered as amounts received in exchange therefor (except that in the case of bonds or other evidences of indebtedness issued before January 1, 1955, this paragraph shall apply only to those issued with interest coupons or in registered form, or to those in such form on March 1, 1954).

* * * *

(26 U.S.C. 1952 ed., Supp. II, Sec. 1232.)

STATEMENT

This appeal is concerned with only one of the issues decided by the Tax Court. (Issue 5, R. 29-32.) The facts with regard to this single issue are not in dispute and can be stated in full as found by the Tax Court as follows:

On or about August 10, 1937, taxpayer, J. I. Morgan, acquired an "Accumulative Investment Certificate," Series F-232668, from Investors Syndicate (presently known as Investors Diversified Services, Inc.) of Minneapolis, Minnesota. Under the terms of the certificate, the issuing company agreed to pay to Morgan (with certain options) at the expiration of 15 years, an amount in excess of his aggregate payments. On September 28, 1952, J. I. Morgan exercised one of the available options to extend the certificate for an additional period of not more than 10 years. (R. 29.)

The following is a detailed statement of the foregoing "Accumulative Investment Certificate" (R. 30):

INVESTORS SYNDICATE

Minneapolis, Minnesota

Name Changed on 3-30-49 to: Investors Diversified Services, Inc.

Number—Series F232668

Dated 8-10-37

Annual Advance Payment for 15 years..... $600.00

Maturity in 15 years (option 13 elected 9-28-52 to continue not more than 10 years).

With optional settlement privileges.

Cash Value for each $25.00 [1] Maturity	Year	To	Cash Value end of year	Paid in	Excess of Cash Value over amounts Paid in	Yearly Increase
$ 44	1		$ 220	$ 600		
134	2		670	1,200		
264	3		1,320	1,800		
400	4		2,000	2,400		
540	5		2,700	3,000		
700	6		3,500	3,600		
860	7		4,300	4,200		
1,024	8		5,120	4,800		
1,200	9		6,000	5,400		
1,418	10	8-10-47	7,090	6,000		
1,600	11	8-10-48	8,000	6,600		
1,810	12	8-10-49	9,050	7,200	$1,850	
2,020	13	8-10-50	10,100	7,800	2,300	$450
2,240	14	8-10-51	11,200	8,400	2,800	500
2,500	15	8-10-52	12,500	9,000	3,500	700
2,724	16	8-10-53	13,620	9,600	4,020	520
2,958	17	8-10-54	14,790	10,200	4,590	570

[1] While it is not material in any way, it should be noted that the heading of the first left-hand column should be "cash value for each $2,500 maturity," in place of "$25.00 maturity."

Taxpayer kept his books and prepared his tax returns on the accrual basis. (R. 7.)

On these facts, the Commissioner contended that the amounts of annual cash increment of $450, $500, $700, $520 and $570 for the years 1950 through 1954, respectively, were taxable as ordinary interest income under Section 22(a) of the 1939 Code and Section 61(a)(4) of the 1954 Code. The Tax Court, relying wholly upon the authority of its prior decision in *Caulkins* v. *Commissioner*, 1 T.C. 656, affirmed by the Sixth Circuit Court of Appeals, 144 F. 2d 482, rejected this contention and held that the annual increments in cash value should be reported as capital gain upon retirement at maturity under Section 117(f) of the 1939 Code and Section 1232 (a)(1) of the 1954 Code rather than as ordinary interest income accrued during the years of increase. (R. 31-32.)

STATEMENT OF POINTS TO BE URGED

1. The Tax Court erred in holding that the annual increments during the tax years in the cash value of an "Accumulative Investment Certificate," owned by the taxpayer-husband, was taxable as capital gain upon retirement of the "Certificate" at maturity, under Section 117(f) of the Internal Revenue Code of 1939 and Section 1232(a)(1) of the Internal Revenue Code of 1954.

2. The Tax Court erred in failing to hold that the annual increments in cash value of the "Certificate" were taxable in the years of increment as interest

income to the taxpayers, who kept their books and filed their income tax returns on the accrual basis.

SUMMARY OF ARGUMENT

The taxpayer here has a right to an annual increment in the cash value of his investment. This increment is ordinary interest income. The taxpayer contends that it must be treated as capital gain by virtue of Section 117(f) of the 1939 Internal Revenue Code and its cognate in the 1954 Code, Section 1232(a)(1), applicable in the year 1954. It is settled, however, that ordinary income cannot be converted into capital gain by any sale or exchange of the right to the income, either separately or in conjunction with the property producing the income. Section 117(f) does not alter this rule; it was enacted in order that gain on the retirement of bonds which would have been taxable as capital gain on a sale or exchange would similarly be taxed as capital gain. Section 117(f) simply provides that a retirement shall be treated the same as an exchange. The section does not require that all of the proceeds received upon retirement of bonds shall be treated as capital gain or otherwise convert ordinary income into capital gain which would not have been taxed as capital gain upon a sale or exchange. The decision of the Sixth Circuit, upon which the taxpayer relies, misconstrues Section 117(f), is contrary to principle and, it is respectfully submitted, should not be followed.

ARGUMENT

The Tax Court Erred in Holding That the Annual Increments in Cash Value of Certificates of Indebtedness Were Not Taxable as Interest Income at Ordinary Rates

A. *The annual increases in the excess of cash value over the amounts paid in during the taxable years represent interest taxable as ordinary income accruing each year*

Taxpayer purchased by annual installments of $600 a 15-year accumulative investment certificate which was extended by exercise of his option in 1952 for an additional period to continue not more than 10 years. (R. 29-30.) As already stated, during each of the taxable years 1950-1954, inclusive, there was an annual increase in the excess of the cash value of the certificate over the amounts paid in. (R. 30-31.) This increment in value of the certificate plainly constitutes compensation for the use of taxpayer's money and thus, it is well settled, is interest. The fact that the contract does not provide for equal amounts of interest to be set aside each year, available to the holder, does not affect the question. The increment is consideration paid for the use of the amounts paid in. *Deputy* v. *Dupont*, 308 U.S. 488, 497; *Old Colony R. Co.* v. *Commissioner*, 284 U.S. 552, 560-561; *Fisher* v. *Commissioner*, 209 F. 2d 513 (C.A. 6th), certiorari denied, 347 U.S. 1014; *Caulkins* v. *Commissioner*, 1 T.C. 656, affirmed, 144 F. 2d 482, 484 (C.A. 6th). Income from interest is, of course, taxable as ordinary income under Section 22(a) of the 1939 Code, *supra*,

and its cognate for 1954, Section 61(a)(4) of the 1954 Code (26 U.S.C., Supp. II, Sec. 61).

B. ***Ordinary interest income is not converted into capital gain by a sale or exchange***

It is established that ordinary income cannot be converted into capital gain by any sale or exchange of the right to the income, either separately or in conjunction with the property producing the income. *Commissioner* v. *P. G. Lake, Inc.*, 356 U.S. 260; *Hort* v. *Commissioner*, 313 U.S. 28; *Helvering* v. *Horst*, 311 U.S. 112; *Tunnell* v. *United States*, 259 F. 2d 916 (C.A. 3d); *United States* v. *Snow*, 223 F. 2d 103 (C.A. 9th); *Trousdale* v. *Commissioner*, 219 F. 2d 563 (C.A. 9th); *Fisher* v. *Commissioner*, *supra*; *Rhodes' Estate* v. *Commissioner*, 131 F. 2d 50 (C.A. 6th); *Doyle* v. *Commissioner*, 147 F. 2d 769 (C.A. 4th); *Helvering* v. *Smith*, 90 F. 2d 590 (C.A. 2d); *Shattuck* v. *Commissioner*, 25 T.C. 416; *Paine* v. *Commissioner*, 23 T.C. 391, reversed on other grounds, 236 F. 2d 398 (C.A. 8th); *Lasky* v. *Commissioner*, 22 T.C. 13, appeal dismissed, 235 F. 2d 97 (C.A. 9th), affirmed, 352 U.S. 1027; 3 B Mertens, Law of Federal Income Taxation (Rev.) secs. 22.40, 22.94.

The rule is fully stated by this Court in *Snow* and by the Sixth Circuit in *Fisher*. In *Snow*, the taxpayer sold his interest in a partnership, including his share of undistributed earnings. This Court rejected his claim for capital gains treatment of the entire gain on the sale, and held that the portion of the amount received from the sale equal to the taxpayer's share of undistributed earnings was taxable

as ordinary income. The opinion summarizes the settled rule and also sets forth the application of the rule by the Sixth Circuit in the *Fisher* case, as follows (pp. 108-109):

> It is a fundamental principle of federal tax law that you must regard any ordinary income derived from an income-producing capital asset as ordinary income. Consequently, the assignment of accrued ordinary income must be treated separately from the assignment of the capital asset which produced the income. This is not an exception to the rule that capital assets held for more than six months shall be given capital gains tax treatment. It is only when a capital asset appreciates in value and is subsequently sold, beyond the six months' period, that the gain realized may be given capital gains tax treatment under Section 117 of the Internal Revenue Code.
>
> The general rule is that a right to receive ordinary income, produced by a capital asset, is not transmuted into a capital asset by the sale or assignment of the capital asset together with the right to receive the ordinary income. We believe that the statutory provisions referred to above dealing with the taxation of partner's income control the disposition of this case. In addition, we see no logical reason why ordinary income from an interest in a partnership should receive different tax treatment than income from any other capital asset.

Fisher v. *Commissioner*, 6 Cir., 209 F. 2d 513, certiorari denied 1954, 347 U.S. 1014, 74 S. Ct. 868, 98 L. Ed. 1136, involved a bona fide sale of notes held for more than six months for a

greater sum than their face value, since the sale price of the notes was made to reflect the interest due thereon. The taxpayer treated the entire transfer as that of an indivisible sale of a capital asset. The court of appeals affirmed the Tax Court, 19 T.C. 384, in holding that the taxpayer must treat his right to ordinary income (interest due on the notes) as ordinary income and not capital gain and that in a tax sense it was unimportant that the interest due on the notes (ordinary income) was later collected by the purchaser of the capital asset (notes) rather than being paid to the seller of the notes, since the purchaser of the capital asset in effect paid the interest to the taxpayer when he paid more for the notes than their face value.

In the Fisher case the court pointed out that the fundamental error of the taxpayer was his failure to recognize that gain realized upon the sale of a capital asset which has appreciated in value is capital gain; whereas, gain realized by way of income from the capital asset is ordinary income.

* * * *

The same view has been expressed by the Court of Appeals for the Third Circuit in *Tunnell* v. *United States, supra,* where it was stated (p. 919):

> The payment of the purchase price, for which a part of the *quid pro quo* was taxpayer's right to receive this income, was as to that part essentially a substitute for what would otherwise be received at a future time as ordinary income. And as to that part, it was not appreciation in value of the capital asset, which would be capital

gain, but income produced by the capital asset, which is ordinary income.

It is thus apparent that if the taxpayer here had sold or exchanged the investment certificates, the portion of the amount received representing the yearly increments in cash value over the amounts paid in would be taxable as ordinary income. In other words, there would be no capital gain, until the sale or exchange price was in excess of the cash value of the policy or installments paid in, whichever was the higher.[2]

C. ***Section 117(f) of the 1939 Code is not a directive that amounts received upon retirement of an evidence of indebtedness, which represent accrued ordinary interest income, shall be converted into capital gain, or that the right to receive the ordinary income shall be treated differently than upon the sale of a capital asset together with the right to receive ordinary income.***

Taxpayer contended below that the annual increment in the cash value of a certificate, such as is here involved, is not properly taxable during the years of increase, but is taxable only upon retirement at maturity as capital gain under Section 117(f) of the 1939 Code,[3] *supra*. We contend, however, that this

---

[2] Until the sixth year, the amounts paid in or cost exceeded cash value.

[3] Section 1232(a)(1) of the 1954 Code, *supra*, is applicable to the taxable year 1954 only. Since this provision is, so far as here relevant substantially identical with Section 117(f) of the 1939 Code, in the discussion only Section 117 (f) will usually be referred to and comments made with respect to it are to be deemed also applicable to the cited 1954 Code section.

increment is taxable as ordinary interest income and, hence, since taxpayer is on the accrual basis, was taxable to him in the respective years in which it accrued. Indeed, the case of accrual taxpayers emphasizes the fallacy in construing Section 117(f) as intending to convert amounts received on account of ordinary income into capital gain. Thus, contemporaneous with the years during which interest accrues, it is not possible to determine whether the certificate will be retired or whether it will be sold or exchanged on or before maturity. As demonstrated in the proceeding Subpoint "B", if it is sold or exchanged, the right to receive the ordinary interest income is not transmuted into a capital gain by the sale or exchange of the capital amount together with the right to receive the ordinary income. But, if the Tax Court is here correct, should the certificate be retired, this right to ordinary income is taxed at capital rates. Hence, whether the interest accrues as income in the case of an accrual taxpayer during the respective years in which he obtains the right to it, will not be determinable—if the Tax Court's construction of Section 117(f) is correct—until years later when it is ascertainable whether the certificate or other evidence of indebtedness is on the one hand sold or is on the other hand retired. It seems highly unlikely that this remarkable result actually represents a correct interpretation of the intent of Congress. This lends support to the view that the Tax Court's construction of Section 117(f) is erroneous and that, in accordance with the settled rule, the interest increment entered into the income

of this accrual taxpayer as ordinary income in the course of each of the taxable years when his right to receive it inured and was complete.

On its face, Section 117(f) simply changed the prior law to provide that amounts received on retirement of corporate bonds and similar evidences of indebtednesses shall be treated the same as amounts received on an exchange of the bonds. It does *not* provide that all of the amount received shall be treated as capital gains; it does *not* in any way modify or qualify the rule that amounts received on the sale or exchange of a capital asset that represent ordinary income are taxable as ordinary income, not as capital gain.

The legislative history confirms this construction of Section 117(f). At the hearings on the 1934 Act, the spokesman for the Tax Committee of the American Bar Association recommending the change simply urged that Congress should decide whether retirement of bonds should be treated as a sale or exchange. House Hearings, Revenue Act of 1934, pp. 179-181, 191. The Committee Report (H. Rep. No. 704, 73d Cong., 2d Sess., p. 31 (1939-1 Cum. Bull. (Part 2) 554, 557) restates the text of the provision as follows:

> 8. Subsection (f) provides that amounts received upon the retirement of corporate bonds and similar evidences of indebtedness shall be considered as amounts received in exchange therefor.

It follows therefore that Section 117(f) was not intended to, and by its terms does not, convert ordi-

nary interest income received upon maturity of an investment into capital gain, since the addition of this subsection was purposed to treat transactions involving retirement of evidences of indebtednesses in the same fashion, so far as application of capital rates is concerned, as sales or exchanges. The purpose was not to impose a lesser tax in their case nor to include ordinary income in the scope of the capital transaction, when it would not be so included in the case of a sale or exchange.

What Congress had in mind in the enactment of Section 117(f) plainly was the purchase of a bond at a price below the amount received upon its retirement, apart from any interest or accrued increment or original interest discount.

Section 117(f) is to be read in the light of the decision of this Court in *Fairbanks* v. *United States*, 95 F. 2d 794, affirmed, 306 U.S. 436, construing the 1926 and 1928 Revenue Acts. As the record in *Fairbanks* shows, the taxpayer acquired corporate bonds of an aggregate par value of $4,000,000 for property valued at $1,096,445.42. (Record on appeal in this Court, No. 8444, p. 60.) Later, a number of the bonds of an aggregate par value of $1,900,000 were retired at par value by the corporation. This Court held that a redemption was not a sale or exchange to which capital gains on the conversion of capital assets were confined by the 1926 and 1928 Revenue Acts. The *Fairbanks* bonds also paid interest, and all accrued interest was also payable on redemption, but no interest payments were involved in the case. (See R. No. 8444, p. 60-61.)

Accordingly it is submitted with respect that *Commissioner* v. *Caulkins*, *supra*, represents a misinterpretation of the meaning of Section 117(f) and should not be followed. In the *Caulkins* case the Sixth Circuit held (p. 484) that the amount received upon the retirement of a certificate, substantially the same as the certificate here involved, included interest, but erroneously, as we view it, approved the taxation of this interest at capital rates. Yet, as already seen, subsequently in *Fisher* v. *Commissioner*, *supra*, in the case of the sale of notes the same court held that since the sale price reflected interest due on the notes, the taxpayer must treat his right to this ordinary income as ordinary income, notwithstanding that the right to it was transferred in the course of a sale of the capital asset. The analysis of the Fisher decision by this Court in *United States* v. *Snow*, *supra*, has already been quoted; for convenience, it is in part repeated here:

> In the *Fisher* case the court pointed out that the fundamental error of the taxpayer was his failure to recognize that gain realized upon the sale of a capital asset which has appreciated in value is capital gain; whereas, gain realized by way of income from the capital asset is ordinary income. (223 F. 2d, *supra*, p. 109.)

It is submitted that in Section 117(f) and its 1954 Code cognate Section 1232(a)-1 Congress intended to express the same, not a different rule. It is here significant that in the *Fisher* case the court noted that the interest would have been taxable income as it came due if taxpayer there had been on the accrual

basis (209 F. 2d., p. 515). See also, *Security Mills Co.* v. *Commissioner*, 321 U.S. 281; *Dally* v. *Commissioner*, 227 F. 2d 724 (C.A. 9th).

Indeed, as stated by Mertens (3B Mertens, Law of Federal Income Taxation, Sec. 22.40, p. 185), "ultimate rejection of the *Caulkins* case appears to be portended by the trend of recent decisions." [4] To the same effect, see also 3B Mertens, Law of Federal Income Taxation, Sec. 22.94, pp. 379-380.

While for some years the Commissioner acquiesced in the *Caulkins* decision (1944 Cum. Bull. 5), namely, from December 25, 1944, to December 31, 1954, thereafter he expressly withdrew his acquiescence. In Rev. Rul. 119, 1953-2 Cum. Bull. 95, the Commissioner ruled that the discount interest on Israeli bonds payable as cash value or on maturity was ordinary income and confined *Caulkins* to its precise facts. And in Rev. Rul. 56-299, 1956-1 Cum. Bull. 603 (republishing Rev. Rul. 55-136, 1955-1 Cum. Bull. 213), the Commissioner withdrew his acquiescence in *Caulkins*. The Supreme Court has only recently sustained the authority of the Commissioner to correct a mistake of law. *Automobile Club* v. *Commissioner*, 353 U.S. 180. Taxpayer is in no way prejudiced by the Commissioner's action, since he purchased the investment certificates in 1937 (R. 29) before the *Caulkins* decision in 1944 and the Com-

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[4] See, e.g., *Shattuck* v. *Commissioner*, 25 T.C. 416, 423; *Tobey* v. *Commissioner*, 26 T.C. 610; *Paine* v. *Commissioner*, 23 T.C. 391, 401, reversed on other grounds, 236 F. 2d 398 (C.A. 8th), and other authorities since *Caulkins* discussed *supra*.

missioner's subsequent acquiescence and withdrawal of acquiescence.[5] As Mertens further states, referring to these rulings and the cases above cited (3B Mertens, *supra*, Sec. 22.40, pp. 185-186):

> These recent decisions reflect a campaign of constant attrition which the Commissioner has waged against the Caulkins case. It resulted, upon the enactment of the 1954 Code, in the inclusion of new provisions which deal with "original issue discount" and attempt to separate the interest element from the capital gain element.[6]

Nor is there any basis for a claim of Congressional ratification of the *Caulkins* decision. Indeed, in recommending the new provision the Senate Committee indicated that the prior law was uncertain,

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[5] Thus Rev. Rul. 56-299 (1956-1 Cum. Bull. 603, 604) provides:

> Pursuant to the authority contained in section 3791(b) of the Internal Revenue Code of 1939, the provisions of this Revenue Ruling will be applied without retroactive effect to any amounts received upon redemption of Accumulative Installment Certificates purchased during the period beginning December 25, 1944, (the date the acquiescence in the Caulkins case was announced) and ending December 31, 1954.

[6] The new statutory provisions enacted by the 1954 Code applies to evidences of indebtedness issued after December 31, 1954. Section 1232(a)(2). However, as already stated, for the taxable year 1954 the Code continues in substance the statutory language contained in Section 117(f) of the 1939 Code. See S. Rep. No. 1622, 83d Cong., 2d Sess. p. 433, 3 U.S.C. Cong. & Adm. News (1954) p. 5076. See Section 1232(a)(1) of the 1954 Code, *supra*. Moreover, a "face-amount certificate" issued after December 31, 1954, on retirement is treated specially. Section 1232(d) and 72(l) of the 1954 Code.

citing explicitly the *Caulkins* case, and that it understood that it was removing doubt in this area rather than changing the existing law;[7] in effect it was left to the courts to settle the question as to evidences of indebtedness issued before January 1, 1954.

It is submitted that the plain meaning of the governing statutory provisions and the later decisions of the courts indicate that the result reached in *Caulkins* does not accord with the weight of judicial authority or with correct principle and that ordinary interest income is taxable as such, whether received or accrued on a sale, exchange or retirement or as here in the case of an accrual taxpayer upon the

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[7] S. Rep. No. 1622, 83d Cong., 2d Sess., p. 112 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4745):

> Under section 117(f) of present law, when a corporate or Government bond in registered form or with coupons attached is retired the transaction is treated as a sale or exchange. There is some uncertainty as to the status of proceeds in these transactions, i.e., as capital gain or as interest income where the bond or other evidence of indebtedness has been issued at a discount (see I.T. 3486, 1941-2, C. B. p. 76, as compared with *Comm.* v. *Caulkins,* 144 F. 2d 482). In these cases, that part of of the amount received on a sale or exchange which may representa partial recovery of discount on original issue is a form of interest income and in fact is deductible as an interest payment by the issuing corporation.
>
> Effective with respect to bonds issued after December 31, 1954, the House bill removes doubt in this area by providing that any gain realized by the holder of a bond attributable to the original issue discount will be taxed as ordinary income. This is, of course, not intended to have any effect with respect to bonds issued before that date.

accrual of the annual interest increment in the excess of cash value of the certificate over the amounts paid in.

CONCLUSION

The decision of the Tax Court with respect to the issue of the "Accumulated Investment Certificate" is erroneous and should be reversed, and the case remanded to the Tax Court for a determination of the income tax deficiency resulting from the taxation of the annual increment of cash value as ordinary income of the taxpayers for the years 1950 through 1954.

Respectfully submitted,

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NO. 16395

United States
Court of Appeals
for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

vs.

J. I. MORGAN AND FRANCES MORGAN,
Respondents

On Petition for Review of the Decision
of the Tax Court of the United States

BRIEF FOR THE RESPONDENTS

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MISCELLANEOUS

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BRIEF FOR THE RESPONDENTS

PRELIMINARY STATEMENT

This is an appeal by the Commissioner of Internal Revenue from that part of an adverse decision of the Tax Court of the United States which determined that the annual increases in the excess of the cash value of an Investors Syndicate Certificate over the amounts paid in by the respondent, J. I. Morgan, did not constitute ordinary income to him during the years of increase, but should properly be reported by him as capital gain upon retirement at the maturity thereof. (Tr. 31-32).

In 1937 respondent, J. I. Morgan, acquired an "Accumulative Investment Certificate," Series F-232668, from Investors Syndicate (presently known as Investors Diversified Services, Inc.) of Minneapolis, Minnesota. The certificate provided for annual advance payments by respondent of $600 for 15 years. It stipulated a cash value at the end of each year (available only if the certificate is surrendered). During the first six years, the cash value is less than the payments made by the purchaser. Thus, at the end of the first year, when $600 has been paid in, the cash value is only $220; at the end of the second year, when $1,200 has been paid in, the surrender value is $670; and at the end of the sixth year, when $3,600 has been paid in, the cash value is $3,500. Beginning only with the seventh year, the cash value exceeds the aggregate amounts paid in by the purchaser. (Tr. 30). The certificate does not provide for the payment of interest by the issuing company. At the expiration of 15 years, the issuing company agreed to pay to Morgan (with certain options) the sum of $12,500. In 1952, Morgan exercised one of the available options to extend the certificate for an additional period of not more than 10 years. (Tr. 29). During the years 1950, 1951, 1952, 1953 and 1954, the yearly increase in the excess of the surrender value over the amounts paid in by Morgan amounted respectively to $450, $500, $700, $520 and $570. (Tr. 30). Such "yearly increase" is, however, not payable separately; it is available only if the certificate is surrendered.

Despite the provisions of Sec. 117 (f) of the Internal Revenue Code of 1939 and Sec. 1232 (a)(1) of the Internal Revenue Code of 1954, the Commissioner of Internal Revenue takes the position that such amounts constituted ordinary income to J. I. Morgan in the respective years. Respondents contend, and the Tax Court so held, that the entire increment is taxable only upon retirement at maturity as capital gain under these provisions of the respective internal revenue codes.

The fact that respondents kept their books of account and prepared their income tax returns on an accrual basis (Tr. 7) does not affect the basic question, since "appreciation in value of property is not even an accrual of income to a taxpayer prior to the realization of such appreciation through sale or conversion of the property". Reg. 111, Sec. 29.41-2; Reg. 118, Sec. 39.41-2(a).

STATUTES INVOLVED

Internal Revenue Code of 1939:

Sec. 22. Gross Income.

(a) General Definition. — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the

foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

Sec. 117. Capital Gains and Losses.

(f) Retirement of Bonds, Etc.—For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

Internal Revenue Code of 1954:

Sec. 61. Gross Income Defined.

(a) General Definition — Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

. . . . .

(4) Interest;

Sec. 1232. Bonds and Other Evidences of Indebtedness.

(a) General Rule.—For purposes of this subtitle, in the case of bonds, debentures, notes, or certificates or other evidences of indebtedness, which are capital assets in the hands of the taxpayer, and which are issued by any corporation, or government or political subdivision thereof—

(1) Retirement.—Amounts received by the holder on retirement of such bonds or other evidences of indebtedness shall be considered as amounts received in exchange therefor (except that in the case of bonds or other evidences of indebtedness issued before January 1, 1955, this paragraph shall apply only to those issued with interest coupons or in registered form, or to those in such form on March 1, 1954).

SUMMARY OF ARGUMENT

I.

With respect to the years 1950 to 1953 inclusive, the specific provisions of Sec. 117(f) of the Internal Revenue Code of 1939 override the broad general provisions of Sec. 22(a) thereof, and with respect to the year 1954, the specific provisions of Sec. 1232(a)(1) of the Internal Revenue Code of 1954 override the broad general provisions of Sec. 61(a) thereof.

II.

The historical background of Sec. 117(f) demonstrates

that upon retirement amounts received in exchange for a bond include the initial discount on the issuance of the bond and that the entire amount received upon retirement is entitled to capital gains treatment.

III.

The phraseology employed in Sec. 117(f) "amounts received . . . upon retirement . . . shall be considered as amounts received in exchange" (for the bond), is the familiar form used by Congress to connote capital gain treatment.

IV.

There is no evidence in the record that the increment in the certificate is accruable as "interest".

V.

In enacting Sec. 1232(a)(1) of the Internal Revenue Code of 1954, Congress intended ordinary income treatment (for original discount) only for instruments issued subsequent to December 31, 1954; and with respect to such instruments, ordinary income accrues only upon their disposition.

ARGUMENT

In *Caulkins* v. *Commissioner,* 144 F. 2d 482, affg. 1 T.C. 656, the United States Court of Appeals for the Sixth Circuit squarely decided that the increment received on retirement of an "Accumulative Investment Certificate" was

taxable as a capital gain under Section 117(f), and not as ordinary income, even though such increment may be in the nature of interest. The certificate there involved was the same type of certificate here in issue; and indeed, issued by the same Investors Syndicate. The *Caulkins* decision is well reasoned and has been consistently followed. Only recently, the Tax Court, in reaffirming *Caulkins,* observed in *Goodstein* v. *Commissioner,* 30 T.C. 1178 (1958), that the Commissioner "has cited no intervening judicial authority which would indicate that the Caulkins case was incorrectly decided nor has any come to our attention."

In *Caulkins,* the Sixth Circuit ruled that the increment was taxable as capital gain "under the plain wording of §117(f)" adding: "a provision that the increment in such cases should be taxable under §22(a) might or might not have been wise and fair; but Congress has not enacted it, and the courts cannot supply it by judicial legislation." For a decade Section 117(f) remained unchanged and it was only until the enactment of the 1954 Internal Revenue Code that the capital gains treatment was removed, but only in respect of evidences of indebtedness issued after December 31, 1954.

In *Caulkins,* the Commissioner argued that the increment actually received upon retirement was taxable as ordinary income, rather than capital gain. Here, the Commissioner's position is more extreme, arguing that the increment is tax-

able as ordinary income in the year of increment. To prevail, the Commissioner must establish not only (a) that the increment is taxable as ordinary income, but also (b) that the increment is accruable in the year of increment. To prevail, the Commissioner must not only overcome the rule in *Caulkins,* but the latter proposition must also be established.

The Commissioner of Internal Revenue at first refused to follow the *Caulkins* decision, CB 1943, p. 28, and then withdrew his nonacquiescence, CB 1944, p. 5. Some nine years later, in Revenue Ruling 119, CB 1953-2, p. 95, the Commissioner stated that "This decision should be limited precisely to what was there decided under the particular facts of that case."* After the enactment of the Internal Revenue Code of 1954, the Commissioner reversed his position in CB 1955-1, p. 7, withdrawing his acquiescence in *Caulkins.* However, no judicial authority was advanced to support the Commissioner's change of position.

We respectfully submit that the *Caulkins* case was decided correctly (and properly accepted by the petitioner herein for a period of more than ten years) and should be followed by this Court for the following reasons:

I.

With respect to the years 1950 to 1953 inclusive, the spe-

*For a perceptive analysis of this general question and a criticism of Revenue Ruling 119, see Janin, "The Israeli Bond Ruling: Legislation By Administrative Fiat?", March, 1955 Taxes—The Tax Magazine, at page 191.

cific provisions of Sec. 117(f) of the Internal Revenue Code of 1939 override the broad general provisions of Sec. 22(a) thereof, and with respect to the year 1954, the specific provisions of Sec. 1232(a)(1) of the Internal Revenue Code of 1954 override the broad general provisions of Sec. 61(a) thereof.

There is no doubt that the increment in value of the certificate held by J. I. Morgan is taxable. The real issue is how the increment is to be taxed and when. The Commissioner labels the increment as "interest" and concludes that it is accruable and taxable in the years in question as ordinary income under Sec. 22(a) of the 1939 Code and Sec. 61(a) of the 1954 Code. The real issue, however, is how Congress chose to tax such increment. Congress has seen fit to remove the increment from the broad general provisions of Sections 22(a) and 61(a) and has provided that it be taxed under the specific provisions of Sec. 117(f) of the 1939 Code and Sec. 1232 of the 1954 Code. This is, in effect, what the Court of Appeals for the Sixth Circuit held in the *Caulkins* case (in respect of the 1939 Code).

As in the case at bar, the Commissioner, in *Caulkins,* contended that Section 117(f) "was not intended to cover the gain from interest, but only capital gain; . . . that the increment here is identical with interest compounded at 5½% during the agreed period; . . . . that the increment in value of the certificate constitutes compensation for the use of the

taxpayer's money, . . . and that as such, it must be taxed in its entirety as ordinary income under §22(a)".*

The Circuit Court reasoned that Congress had not made the differentiation urged by the Commissioner, stating that "the decisive question is whether the amount received by the taxpayer falls within Section 117(f)***". It concluded that the increment was covered "under the plain wording of Section 117(f)". The Court thus recognized that the specific provisions of a particular statute—Section 117(f)—override the provisions of a general statute—Section 22(a).

Section 117(f) is, however, not a one-way street, for it mandates not only capital gains but also capital losses, rather than ordinary losses, to the detriment of a taxpayer. Unlike *Caulkins,* the situations of the Commissioner and the taxpayer were reversed in a case involving the question of whether a loss arising from the redemption of corporate securities was deductible as a bad debt under Sec. 23(k) of the 1939 Code, or whether such loss had to be treated as a capital loss under Sec. 117(f). The Supreme Court held in *McClain v. Commissioner of Internal Revenue,* 311 U.S. 527, 61 S. Ct. 373, that the word "retirement" appearing in Sec. 117(f) covered this situation. The Court stated:

"It is plain that Congress intended by the new sub-

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*In *Caulkins,* there was direct testimony by an officer of the issuing company that the difference between the amount paid in and the amount received at maturity would be equal to 5½% of the amount paid in. No such evidence is present in the case at bar.

section (f) to take out of the bad debt provision certain transactions and to place them in the category of capital gains and losses."

In *Caulkins,* the Tax Court, after quoting this passage in *McClain,* reasoned (1 T.C. at 661):

> "This tribunal has held that by a parity of reasoning Congress also intended to take out of the ordinary income provisions of the revenue act gains realized by a taxpayer in connection with the retirement of the specified obligations. *William H. Noll,* 43 B.T.A. 496".

In effect, the Commissioner seeks to limit the statutory language, ". . . amounts received . . . upon the retirement" to the "capital" element and to exclude therefrom the increment of the type here involved. The statutory language of Section 117(f) does not permit of any such limitation. As was stated by the Tax Court in *Paine* v. *Commissioner,* 23 T.C. 391, 401 (1954) rev'd. on other grounds, 236 F. 2d 398 (8th Cir. 1956):

> "The effect of the holding in the *Caulkins* case is, therefore, that any increment realized on the retirement of an obligation which qualifies within the meaning of Section 117(f)***is part of *that amount* which is deemed to have been received as a result of an exchange, and is thus entitled to capital gains treatment.
>
> "We think it is clear that the decision in the *Caulkins* case was based solely upon the precise language of Section 117(f) which left no doubt that the *entire* amount received as a result of retirement of notes in registered

> form was to be deemed received in exchange for such notes despite the recognition by both Courts that the increment there under consideration was essentially interest.***
>
> (Italics in opinion)

Much the same argument advanced here was pressed by the Commissioner in *Commissioner* v. *Winslow,* 113 F. 2d 418 (1st Cir. 1940), affg. 39 B.T.A. 373 (1939). The taxability of life insurance proceeds payable in installments was there involved. The Commissioner argued that the language of the statute—"amounts received under a life insurance contract paid by reason of the death of the insured"—should be limited to the capital payments payable by reason of the insured's death and that the "interest" increment reflected in the installments was outside the purview of the statutory language. That construction was rejected. Said the Circuit Court: "The language of this section . . . is to be interpreted in its ordinary and natural meaning".

See also: *Commissioner* v. *Carman,* 189 F. 2d 363 (2d Cir. 1951), affg. 13 T.C. 1029 (1949); *Pierce Corp.* v. *Commissioner,* 120 F. 2d 206 (5th Cir. 1941).

In *Lurie* v. *Commissioner,* 156 F. 2d 436, this Court in 1946 ruled that Section 117(f) must be interpreted in accordance with the language employed, and rejected the Commissioner's attempt to read into Section 117(f) a limitation not contained in the statute; viz, that the evidence of indebt-

edness must be in registered form for a specified period prior to retirement.

II.

The historical background of Sec. 117(f) demonstrates that upon retirement amounts received in exchange for a bond include the initial discount on the issuance of the bond and that the entire amount received upon retirement is entitled to capital gains treatment.

Section 117(f) had its historical genesis in *I.T. 1637,* II-1 C.B. 36 (1923). At issue was the taxable character of a profit of 6x dollars to be realized by the holder upon the maturity of a non-interest bearing state obligation originally issued at a discount (issued at 88). The Bureau of Internal Revenue reasoned: "When an obligation matures it is neither sold nor exchanged" and thereupon ruled that the 'taxable profit derived upon maturity . . . is, therefore, not capital gains' derived from the sale or exchange of capital assets . . . ". Although part or all of the 6x dollars manifestly represented "interest increment", in the Commissioner's terminology (the obligations having originally been issued at a discount of 12x dollars), the taxability thereof turned solely on the question as to whether a redemption constituted a sale or exchange—not whether discount is the equivalent of interest.

The Bureau's rationale was rejected in *Henry P. Werner,*

15 B.T.A. 482 (1929), in an unanimous decision of the Board of Tax Appeals. The taxpayer had purchased in 1920 certain 20-year convertible debenture 5% bonds for $8,870 directly from the corporate obligor—at a discount. In 1923 the bonds were called for redemption and the taxpayer received $11,000 cash in redemption of the bonds, realizing a profit of $2,130.

As explicitly stated in the opinion, the sole issue posed by the contending parties was whether a redemption constituted a sale or exchange. No suggestion emanated from the Commissioner—and, indeed, the Board did not consider—whether the original discount was the equivalent of interest and, hence, taxable as such when realized by the bondholder. The Board observed that Congress intended to accord capital gains treatment to the "sale or other disposition of assets" and concluded that the redemption of the bonds "certainly . . . comes within these broad terms", (15 B.T.A. at 485).

The Bureau thereupon issued *I.T. 2488,* VIII-2 C.B. 127 (1929), announcing its adherence to the *Werner* rationale, and revoking *I.T. 1637.* The ruling declared that the net gain from bonds (held for more than two years), whether received as the result of the maturity of the bonds or as the result of their redemption before maturity was taxable as a capital gain—with no suggestion that capital gain treatment was to be limited to capital appreciation or that any interest element or increment was to be excluded therefrom. It cited

the *Werner* case for the proposition that "the redemption of bonds at a 'called' date for an amount in excess of the cost of the bonds to the bondholder results in a gain from the sale or exchange of capital assets . . . ". It was then the "amount in excess of the cost of the bonds" which qualified for capital gain, irrespective of its character as capital appreciation or interest increment.

At the close of 1932, the *Werner* decision was expressly overruled by the Board of Tax Appeals in *John H. Watson, Jr.*, 27 B.T.A. 463 (1932). The issue posed was whether a loss upon redemption of Liberty Loan Bonds was an ordinary loss or a capital loss. The Board now reasoned: "Payment of the amounts specified in the bonds, either at maturity or pursuant to an authorized call prior to maturity, is not a 'sale or exchange' of such bonds. It is merely the payment of an obligation according to its fixed terms. . . . Loss incurred or gain realized in such a transaction is not a capital loss or a capital gain under the definition found in the statute" (27 B.T.A. at 465).

In 1933, the Bureau issued *I.T. 2678*, XII-1 C.B. 117 (1933), announcing its adherence to the *Watson* decision, and revoking *I.T. 2488*.

Section 117(f) was first enacted as a part of the 1934 Revenue Act, upon the recommendation of the American Bar Association, to clarify the uncertainty caused by these apparently conflicting decisions of the Board of Tax Ap-

peals. Of particular significance is the fact that the memorandum submitted to Congress by the American Bar Association made reference to the *Werner* case, for that case involved gain realized (representing original discount) on a bond acquired by the holder directly from the obligor.

The American Bar Association urged Congress to make the statute show clearly that the gain involved in the *Werner* case was entitled to the benefits of the capital gains provisions even though only a retirement was involved.* Thus, it is clear that when Sec. 117(f) was written, the fact of original discount on issuance of bonds was presented to Congress, yet Congress did not prescribe a different method of taxation for such discount; rather it gave the benefits of capital gains to such discount, and any other appreciation realized by the holder, on retirement of a bond.

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*In support of its recommendation, the American Bar Association stated:

"Section 101(c) of the 1932 Act defines capital gains and losses as the gains or losses resulting from the 'sale or exchange' of capital assets. The United States Board of Tax Appeals has determined in *Henry R. Werner,* 15 B.T.A. 482, that included within the terms of 'sale or exchange', was the redemption by the obligor, at or before maturity, of a capital asset. Later, the Board held in *Watson,* 27 B.T.A. 463, that such redemption was not a 'sale or exchange'. Your committee believes that the Congress did not intend to remove from the benefits of the capital gains and loss provisions gains or losses from the redemption of capital assets, especially when such gains or losses if the assets had been sold by the holder immediately before redemption, would be considered capital gains or losses." See *Hearings, Senate Finance Committee, 73d Cong., 2d Sess., on H.R. 7835, p. 76.*

III.

The phraseology employed in Sec. 117(f) "amounts received . . . upon the retirement . . . shall be considered as amounts received in exchange" (for the bond), is the familiar form used by Congress to connote capital gain treatment.

A complete or partial liquidation of a corporation is not a sale or exchange and would, under ordinary circumstances, not give rise to capital gain or loss. The technique employed by Congress to give such transactions the benefits of the capital gains and loss provisions was to provide (Section 115(c), 1939 Code):

> "Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and the amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock."

A distribution in complete or partial liquidation of a corporation may represent in whole or in part a distribution of earnings or profits. A distribution of earnings or profits, if not pursuant to a plan of liquidation, would be a dividend and taxable as ordinary income (Section 115(a), 1939 Code). The Commissioner has never contended, as he does here, that the portion of the distribution in liquidation representing earnings or profits was not covered by the language "in exchange for the stock" and should be taxed as ordinary income rather than capital gain. Such a construction of Sec-

tion 115(c) is precluded by the statutory language employed and for the same reason such construction of Section 117(f) is also precluded.

The language of Section 115(c) (1939 Code) has been carried forward into the 1954 Code (see Section 331(a).)*

In ordinary circumstances, the cancellation of a lessee's lease or of a distributorship agreement is not a sale or exchange and therefore will not be entitled to the benefits of the capital gains provision. Congress, however, decided that such amounts should result in capital gain and the technique employed was the adoption of language virtually identical with the crucial words in Section 117(f). Thus, Section 1241 of the 1954 Code reads:

> "*Amounts received* by a lessee for the cancellation of a lease, or by a distributor of goods for the cancellation of a distributor's agreement (if the distributor has a substantial capital investment in the distributorship), *shall be considered as amounts received in exchange* for such lease or agreement." (emphasis supplied)

In explanation of this provision the Senate Committee Report stated:

"Your committee has taken action to insure certain

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*See also *Rev. Rul. 57-243* in which the Internal Revenue Service ruled that the characterization in Section 331(a) was not limited to any particular section and was applicable to any type of transaction covered by the Code. In the same manner Section 117(f) characterizes the transaction as an exchange. As a consequence, amounts received which might otherwise be taxed as ordinary income are given the benefits of capital gain treatment.

types of transactions will be regarded as sales and thus may give rise to capital gain or loss" (S. Rept. No. 1662, 83d Cong., 2d Sess, 1954, p. 115).

IV.

There is no evidence in the record that the increment in the certificate is accruable as "interest".

The record in the instant case does not appear to include any facts which would demonstrate that the annual increments in question represented interest at some specified rate. As the record shows, (Tr. 30) at the end of the sixth year the cash value of the certificate was less than the amount paid in by J. I. Morgan. This can hardly be said to be the consequence of an interest computation. If income is realized in the years in which the aggregate increment exceeds the aggregate amount paid in, then it would appear that a deduction should be allowed in the years in which the cash value is less than the amount paid in. We very much doubt, however, that the Commissioner would allow such a deduction. The annual increases in value of the certificate involved in this case are not constant and do not appear to be susceptible of an interest computation.

Of critical importance is the fact that the increment is not available to the holder of the certificate without its surrender. Thus, the increment is substantially different from the interest coupon on a bond which may be detached and

cashed without affecting the bond itself. Here the increment can be realized only when the investment is terminated.

The certificate here involved is more akin to an insurance contract in which the cash surrender value first is less than and thereafter may exceed the aggregate amount of premiums paid. The increment in surrender value of an insurance contract has never been held to constitute "interest" even though it may contain elements of interest. Furthermore, the increment has never been held realized for tax purposes until the policy is surrendered.

The Investors Syndicate Certificate held by J. I. Morgan is more akin to an investment on which gain or loss is realized upon disposition. Mere appreciation is not subject to tax. The fact that the holder of the instrument has the power to dispose of the instrument and receive the increment is in and of itself not the accrual event. In the same manner, the holder of a share of stock which has appreciated in value may realize the appreciation by sale, but will not, prior to the sale, be required to accrue appreciation for tax purposes. So, too, the beneficiary of a pension plan may obtain the pension benefits by leaving the employ of the company, but this right so to do does not require him to accrue the potential income for tax purposes. In all these situations the income does not "accrue"—it is realized only upon the disposition

of the investment.*

Finally, it should be noted that the original discount or increment in instruments issued *after* December 31, 1954, are not taxed by Sec. 1232 of the 1954 Code as interest income, but only as gain from the sale or exchange of property which is not a capital asset. Such a gain accrues only upon the disposition of the asset and not ratably during the time it is held by the taxpayer.

V.

In enacting Sec. 1232(a)(1) of the Internal Revenue Code of 1954, Congress intended ordinary income treatment for original discount only for instruments issued subsequent to December 31, 1954; and with respect to such instruments, ordinary income accrues only upon their disposition.

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*This principle is reflected in a recent Letter Ruling, dated April 21, 1959 (1959 Prentice-Hall Federal Tax Service, par. 54864), holding that regular earnings credited to a savings and loan association bonus savings account are not taxable until the year of withdrawal or termination. Under the plan, the depositor made $10 monthly deposits until the amount, plus earnings credited by the association, equaled $2,000. In addition to the regular earnings, the plan provided a long term bonus of one percent, or a percentage thereof, if the depositor did not withdraw from the plan for a specified number of months. Revoking an earlier Letter Ruling, dated January 31, 1958 (1958 Prentice-Hall Federal Tax Service, par. 54786), the Service now ruled that the regular earnings (credited semi-annually) and the bonus are taxable only in the year in which the long term bonus period of 156 months terminates, or in the year of actual withdrawal, whichever occurs earlier, on the ground that the depositor must withdraw from the plan in order to secure the accumulated semi-annual earnings and the interim bonus earned up to that time, and by such withdrawal, the right to accumulations towards a larger bonus would be forfeited.

As previously noted, the Commissioner's acquiescence in the *Caulkins* case was not withdrawn until 1955. When the 1954 Internal Revenue Code was enacted, therefore, the Commissioner's acceptance of the *Caulkins* rule was a matter of record. When Congress enacted Sec. 1232(a) of the 1954 Code, it was clearly cognizant of the effect of the *Caulkins* case upon Sec. 117(f) of the 1939 Code and this recognition is reflected in Sec. 1232(a) of the 1954 Code. In explanation of the 1954 amendment, the Report of the House Committee on Ways and Means (accompanying H.R. 8300, General Explanation, Section XXVII, Subdivision E) stated:

> "*Under existing law* any gain realized from a corporate or Government bond in registered form or with coupons attached is treated as a capital gain either if the bond is held to retirement or if it is sold or exchanged. Part or all of this gain, however, may represent discount on original issue which is a form of interest income and, in fact, is deductible as an interest payment by the issuing corporation.
>
> "*Effective with respect to bonds issued after December 31, 1954,* the committee bill provides that any gain realized by the holder of a bond attributable to the original issue discount will be taxed as ordinary income.***" (emphasis supplied)

Section 1232(a)(1) provides:

> "General rule.—For purposes of this subtitle, in the case of bonds, debentures, notes, or certificates or other evidences of indebtedness, which are capital assets in the hands of the taxpayer, and which are issued by any

corporation, or government or political subdivision thereof—

> (1) Retirement. — Amounts received by the holder on retirement of such bonds or other evidences of indebtedness shall be considered as amounts received in exchange therefor (except that in the case of bonds or other evidences of indebtedness issued before January 1, 1955, this paragraph shall apply only to those issued with interest coupons or in registered form, or to those in such form on March 1, 1954)."

The above section makes very clear the rule that an amount received upon a retirement of a note is received in exchange therefor. The exception stated in the parenthetical clause at the end is not applicable here because the instrument involved in this case was in registered form on March 1, 1954. However, the fact that an exception is stated indicates Congressional recognition of the possibility that the 1954 Code would become applicable to instruments issued before January 1, 1955 and not in registered form on March 1, 1954. As to such instruments, Sec. 1232(a)(1) did not apply. But as we have previously noted, the instrument here involved was in registered form on March 1, 1954 and therefore the general rule stated in Sec. 1232(a)(1) does apply.

Section 1232(a)(2)(A) provides:*

"General rule.—Except as provided in subparagraph (B), upon sale or exchange of bonds or other evidences

*As amended by the Revenue Act of 1958.

of indebtedness issued after December 31, 1954, held by the taxpayer more than 6 months, any gain realized which does not exceed—

(i) an amount equal to the original issue discount (as defined in subsection (b),) or

(ii) if at the time of original issue there was no intention to call the bond or other evidence of indebtedness before maturity, an amount which bears the same ratio to the original issue discount (as defined in sub-section (b)) as the number of complete months that the bond or other evidence of indebtedness was held by the taxpayer bears to the number of complete months from the date of original issue to the date of maturity,

shall be considered as gain from the sale or exchange of property which is not a capital asset. Gain in excess of such amount shall be considered gain from the sale or exchange of a capital asset held more than 6 months."

The above subsection is inapplicable here because it relates only to evidences of indebtedness issued after December 31, 1954. However, when the section refers to sale or exchange of bonds, it also includes a retirement of bonds by reason of Section 1232(a)(1). Thus, a retirement is a sale or exchange under 1232(a)(2), which does not apply to the taxpayer herein, and under 1232(a)(1) which does apply to the taxpayer herein.

Section 1232(a)(1) and Section 1232(a)(2) must be read together. Consider, for example, the situation which occurs when an instrument issued after December 31, 1954 is retired. Section 1232(a)(2) standing by itself is not ap-

plicable because it covers only sales or exchanges. It is necessary to look to Section 1232(a)(1), which defines sale or exchange to include retirement, before the tax consequences of the transaction can be determined.

If Congress had intended ordinary income treatment for instruments issued before January 1, 1955 and retired during a 1954 Code year, it could easily have so provided. However, Congress saw fit to give ordinary income treatment only to obligations issued after December 31, 1954 and it follows that Congress did not intend ordinary income treatment to instruments issued before January 1, 1955 which qualified under Section 1232(a)(1). Obligations which do not qualify under 1232(a)(1), such as those which were not in registered form on March 1, 1954, receive ordinary income treatment because a retirement is not deemed an exchange therefor.

Furthermore, with respect to those instruments which were subjected to ordinary income treatment, Congress decided that the ordinary income would accrue only upon the disposition of the obligation and not during its existence. Accordingly, Congress provided, in Section 1232(a)(2), that the ordinary income would accrue as gain from the sale or exchange of property which is not a capital asset only when the instrument was sold, exchanged or (by reference to Section 1232(a)(1)) retired.

Of significance also is the fact that no ordinary income

treatment is charged to instruments issued after December 31, 1954 if the original discount is less than one-fourth of one per cent of the redemption price at maturity multiplied by the number of complete years to maturity (see Section 1232(b)(1)).

The regulations also support the contention made here. Thus, Section 1.1232.1(a) provides:

> "In general. Section 1232 applies to any bond, debenture, note, or certificate or other evidence of indebtedness (referred to in this section and §§1.1232-2 through 1.1232-4 as an obligation) (1) which is a capital asset in the hands of the taxpayer, and (2) which is issued by any corporation, or by any government or political subdivision thereof. In general, section 1232(a)(1) provides that the retirement of an obligation, other than certain obligations issued before January 1, 1955, is considered to be an exchange and, therefore, is usually subject to capital gain or loss treatment; and section 1232(a)(2) provides that in the case of a gain realized on the sale or exchange of certain obligations issued at a discount after December 31, 1954, a portion of the gain constitutes ordinary income.***"

The first sentence of the above quotation indicates that Section 1232 applies to *any* bond, note, etc., which is a capital asset in the hands of the taxpayer and which is issued by a corporation. The instrument here involved clearly so qualifies. The first portion of the second sentence states that the retirement of an obligation "is considered to be an exchange and, therefore, is usually subject to capital gain or loss treat-

ment". The exception in the sentence for obligations issued before January 1, 1955 refers to those obligations which were not in the required form on March 1, 1954. Thus, the regulation confirms the statutory interpretation advanced here.

Finally, Section 72(e) and Section 72(1) of the 1954 Code made crystal clear that the increment, even where treated as ordinary income (namely, on instruments issued after December 31, 1954) is not taxable until the disposition of the instrument. The increment on the type of instrument here involved is accorded the same tax treatment as an "endowment contract" (see Section 72(1)); and like an endowment contract, it is the lump sum receivable upon surrender or maturity of the certificate which is taxable and the amount so taxable can be spread over three years (Section 72(e)(3)). The Committee Report declares that "certain relief provisions applicable to endowment contracts will be applied also to face-amount certificates". S. Rept. No. 1662, 83d Cong., 2d Sess., (1954) p. 436. Obviously, the relief provisions would be frustrated if the increment were to be taxed in the successive years when the increment occurred, rather than in the year of retirement or surrender when the lump sum payment was received by the holder of the instrument.

CASES CITED BY PETITIONER

We believe that the cases cited by the Commissioner in his brief are easily distinguishable. In *Paine* v. *Commissioner,* 23 T.C. 391, reversed on other grounds, 236 F.2d 398, the instruments involved were not in registered form and, therefore, not covered by Section 117(f). *United States* v. *Snow,* 223 F.2d 103, and *Tunnell* v. *United States,* 259 F.2d 916, involved disposition of a partnership interest in which income had accrued to the selling partner prior to the sale. Again, these are situations not defined in Section 117(f) and, therefore, not pertinent to this controversy.

Shattuck v. *Commissioner,* 25 T.C. 416, involved a situation in which bonds were issued at face and provided for specific payments of interest. The Tax Court carefully distinguished Section 117(f), pointing out, at page 423 of the opinion, that it did not embrace the portion of the amount paid by the obligor which represents the discharge of the obligor's existing obligation to pay accrued and defaulted interest on the bonds. *Tobey* v. *Commissioner,* 26 T.C. 610, involved a situation substantially similar to *Shattuck,* and Section 117(f) was held inapplicable on the same grounds. *Fisher* v. *Commissioner,* 209 F. 2d 513, involved defaulted interest on bonds which were not in registered form.

In no case cited by the Commissioner in his brief was the rule of the Caulkins case disaffirmed or even questioned. The Court of Appeals for the Sixth Circuit, which decided

the Caulkins appeal, found it unnecessary to reverse itself in deciding the *Snow* and *Fisher* cases.

It is interesting to note that the Commissioner has failed to cite two recent decisions of the Tax Court which adhere to the rule of the *Caulkins* case. *Kormendy* v. *Commissioner,** T.C. Memo 1959-72, filed April 15, 1959; *Goodstein* v. *Commissioner,* 30 T.C. 1178 (1958). In *Goodstein* the Commissioner made much the same argument as he does here and was repulsed by the Tax Court. Said the Tax Court: "The instant case falls squarely within the holding in the *Caulkins* case. The various contentions were carefully analyzed by this Court and by the Court of Appeals for the Sixth Circuit in the *Caulkins* case, and it was concluded that under the language of Section 117(f) there was no alternative to holding that the full amount received upon redemption was to be treated as amounts received in exchange for the evidences of indebtedness there involved. In the instant case the respond-

*Kormendy involved the taxability of the increment upon retirement in 1954 of certificates similar to the type of certificate here. In reaffirming *Caulkins* the Tax Court said:

"This Court has very recently reaffirmed and followed its decision in the *Caulkins* case, in *J. I. Morgan, Inc.*, 30 T.C. 881 (July 9, 1958), on appeal (C.A. 9, Dec. 11, 1958), and in *Eli D. Goodstein,* 30 T.C. 1178 (Aug. 28, 1958) on appeal (C.A. 1, Dec. 30, 1958). Respondent makes no effort to distinguish any of the above three cases from the cases at bar. We think the decisions of this Court in those cases are squarely in point here and control our decision in the present cases. The cases cited by respondent do not support his theory.

"Accordingly, following the decision of this Court in the *Caulkins* case, we conclude that under section 117(f) of the 1939 Code and section 1232(a)(1) of the 1954 Code the gain on the redemption of the certificates here involved were properly reported by petitioners as capital gains."

ent advances no additional arguments in support of his position. He has cited no intervening judicial authority which would indicate that the *Caulkins* case was incorrectly decided nor has any come to our attention. Under the circumstances, we adhere to the position previously taken in the *Caulkins* case and hold that the petitioners properly reported their gain on the redemption of the debentures as long-term capital gain,***"

Initially, the Commissioner filed a notice of appeal with respect to this issue resolved against him in the *Goodstein* case but, thereafter, withdrew the appeal.

CONCLUSION

We respectfully submit that the basic issue is not whether the annual increment in value of the certificate involved here is in the nature of interest but, rather, how Congress chose to tax such increment when it enacted Section 117(f). As the Court of Appeals stated in the *Caulkins* case, at page 484 of the opinion:

> "Where statutory standards are lacking, statutory language is to be read in its natural and common meaning. Helvering v. William Flaccus Oak Leather Co., 313 U.S. 247, 249, 61 S.Ct. 878, 85 L.Ed. 1310; Kales v. Commissioner, 6 Cir., 101 F.2d 35. In the present case, the promise was to pay $20,000 at the expiration of the ten-year period. Clearly $20,000 was the amount received on the retirement of the certificate, and under the plain

wording of §117(f), it was taxable as a capital gain. A provision that the increment in such cases should be taxable under §22(a) might or might not have been wise and fair; but Congress has not enacted it, and the courts cannot supply it by judicial legislation."

It is submitted that the *Caulkins* case was decided correctly by the Court of Appeals for the Sixth Circuit in 1944 and properly followed by the Commissioner until he reversed his position again on this issue in 1955. No good reason appears why Section 117(f) of the 1939 Code and Section 1232(a)(1) of the 1954 Code are not applicable to the investment certificate involved in this case.

Respectfully submitted,

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Attorneys for Respondents

No. 16395

In the United States Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

J. I. MORGAN AND FRANCES MORGAN, RESPONDENTS

On Petition for Review of the Decisions of the Tax Court of the United States

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The brief for the taxpayer does not come to grips with the issue in the case concerning the meaning of Section 117(f) of the 1939 Code and the corresponding provision of Section 1232(a)(1) of the 1954 Code. The Commissioner's position is based on the proposition that, if the taxpayer had sold or exchanged the investment certificates, the portion of the amounts received representing the yearly increments in cash value over the amounts paid in would be taxable as ordinary income. Section 117(f) simply applies the same treatment to a retirement of the indebtedness. The taxpayer's brief does not directly deny this basic proposition as to treatment of accrued

ordinary income upon a sale or exchange, but reiterates his contention that Section 117(f) requires that all of the amounts received on retirement must be treated as capital gain, regardless of their treatment on an exchange. But under Point IV of his brief (pp. 19-21) taxpayer asserts that there is no evidence in the record that the increment in the certificate is accruable as interest. On the contrary, it is decisively settled that the increment is ordinary interest income and that it accrues each year.

As to the fact that the increment is ordinary interest income, it is clear from the face of the certificate that the difference between the amount paid for the investment certificate and the annual increment is the original discount of a non-interest bearing obligation. It has been settled since 1918, by decisions of this and other courts and Treasury Regulations, that such original discount is interest. *Gt. W. Power Co.* v. *California*, 297 U.S. 543; *San Joaquin Light & Power Corp.* v. *McLaughlin*, 65 F. 2d 677 (C.A. 9th); *Western Maryland Ry. Co.* v. *Commissioner*, 33 F. 2d 695, 697 (C.A. 4th); G.C.M. 21890, 1940-1 Cum. Bull. 85.[1] As taxpayer's chief reliance, *Commissioner* v. *Caulkins*, 144 F. (2) 482

[1] The above decisions hold that original discount on interest-bearing obligations is an additional interest charge deductible as such by the debtor corporation. *A fortiori*, original discount on a non-interest bearing obligation takes the place of interest and is the interest. The article cited by the taxpayer, Janin, The Israeli Bond Ruling: Legislation By Administrative Fiat? 33 Taxes—The Tax Magazine, 191 (1955), ignores these decisions and is thus basically wrong. Rul. 119, 1953-2 Cum. Bull. 95, cited in our main brief (p. 18), is entirely sound.

(C.A. 6th) itself points out (p. 484) with respect to a like certificate, the increment in value of the certificate is compensation for the use of the money paid in, and, thus, is interest and it is immaterial that the contract does not provide for equal amounts of interest to be set aside each year.

It is equally settled that the annual increment of a non-interest bearing indebtedness representing payments of the original discount accrue each year to an accrual-basis taxpayer, the taxpayer here. (R. 7.) Such accrual is clearly indicated by express provisions of Section 42(b) of the 1939 Code, re-enacted by Section 454(a) of the 1954 Code. This section expressly authorizes a cash basis taxpayer to accrue the annual increment of an original discount on a non-interest bearing obligation redeemable for fixed amounts increasing at stated intervals exactly the type of obligation involved here.[2] The Committee

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[2] Section 42(b) of the Internal Revenue Code of 1939 reads in relevant part as follows:

> SEC. 42. PERIOD IN WHICH ITEMS OF GROSS INCOME INCLUDED.
>
> * * * *
>
> (b) [As added by Section 114 of the Revenue Act of 1941, c. 412, 55 Stat. 687, and amended by Sec. 2 of the Act of March 26, 1951, c. 19, 65 Stat. 26]. *Non-interest-bearing Obligations Issued at Discount.* If in the case of a taxpayer owning any noninterest-bearing obligation issued at a discount and redeemable for fixed amounts increasing at stated intervals or owning an obligation described in paragraph (2) of subsection (d), the increase in the redemption price of such obligation occurring in the taxable year does not (under the method of accounting used in computing his net income) constitute income to him in such year, such tax-

Reports on Section 42(b) disclose that the section is intended to give a cash basis taxpayer the privilege of reporting the annual increment as if he were an accrual-basis taxpayer, who is required to do so. Thus the House and Senate Committee Reports state as follows (H. Rep. No. 1040, 77th Cong. 1st Sess., pp. 40-41 (1941-2 Cum. Bull. 413, 445); S. Rep. No. 673, Part I, *idem*, p. 29 (1941-2 Cum. Bull. 466, 490)):

> This section provides that any taxpayer who owns any non-interest bearing obligations issued at a discount and redeemable for fixed amounts increasing at stated intervals and who, under the method of accounting used by him in computing his net income, is not permitted to report the increment in value of such obligations as it accrues, may, at his election, treat such increment in value as constituting income to him in the year in which it accrues rather than in the year in which the obligations are disposed of, redeemed, or paid at maturity. Under existing law a taxpayer on the accrual basis who owns, for example, non-interest bearing United States defense bonds is required to report the increment as it accrues, whereas a taxpayer on the cash basis who owns such defense bonds is required to treat the entire increment in value as being income received in the year of redemption

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payer may, at his election made in his return for any taxable year beginning after December 31, 1940, treat such increase as income received in such taxable year. * * *

* * * *

(26 U. S. C. 1952 ed., Sec. 42.)

> or maturity. Therefore, with respect to such non-interest bearing United States defense bonds, the effect of this section is to extend, at the election of the taxpayer, the accrual method to a taxpayer on the cash basis, but only for the limited purpose of reporting the increment in value of such bonds as it accrues.
>
> * * * *

The taxpayer has, therefore, completely failed to rebut the proposition that the annual increment of the investment certificates in the case at bar represents ordinary interest income, is includible as it accrues annually in the income of an accrual-basis taxpayer, and is taxable as ordinary income if received on a sale or exchange. The taxpayer's failure to rebut this basic proposition undermines much of the argument in his brief. Taxpayer's major reliance is upon *Commissioner* v. *Caulkins*, *supra* (in its opening and Point I of the argument, Br. 6-13) but he begs the issue in that he fails to show whether *Caulkins* was correctly decided and should be followed. The Commissioner here is not attempting to limit the statutory language of Section 117(f) to the "capital" element (cf. Br. 11) but is rather contending that Section 117(f) merely provides that all amounts received upon retirement should be treated the same as if all the amounts were received upon exchange. Hence *McLain* v. *Commissioner*, 311 U.S. 527, and *Commissioner* v. *Winslow*, 113 F. 2d 418 (C.A. 1st), cited by the taxpayer (Br. 12) are not to the contrary. *Commissioner* v. *Carman*, 189 F. 2d 363 (C.A. 2d), and *Pierce Corp.* v. *Commissioner*, 120 F. 2d 206 (C.A. 5th), are not in point, since

they dealt with a purchase of an indebtedness for a single price, or "flat", including both the amount of the principal and interest accrued prior to the purchase. Such accrued interest is not interest to the purchaser of an obligation in default as to interest but simply a cost of the indebtedness to him. The distinction, so far as it affects the problem in the case at bar, was recognized in *Estate of Rickaby* v. *Commissioner*, 27 T. C. 886. This Court's decision in *Lurie* v. *Commissioner*, 156 F. 2d 436, did not involve the issue at bar, although it may be noted that in *Lurie* the taxpayer was claiming capital gain only on payments for principal. See 4 T. C. 1065, 1067.

The taxpayer's discussion of the historical background of Section 117(f) in Point II of his brief (pp. 13-16) likewise fails to meet the issue in this case. Each of the cited rulings was confined exclusively to the question of whether a retirement of an indebtedness was a sale or exchange. See *United States* v. *Fairbanks*, 95 F. 2d 795 (C.A. 9th), affirmed, 306 U.S. 436. In none of them is there any reference to treatment of original discount or interest upon retirement of a bond.[3]

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[3] In I.T. 1637, II-1 Cum. Bull. 36 (1923) no specific amounts are stated. *Werner* v. *Commissioner*, 15 B.T.A. 482 did not involve noninterest-bearing bonds and there is no statement in the facts as to whether the discount was original discount. I.T. 2488, VIII-2 Cum. Bull. 127 (1929) similarly does not mention any problem of interest and *Watson* v. *Commissioner*, 27 B.T.A. 463 (1932) involved a purchase of liberty bonds at a premium. None of the decisions affect the settled rulings, *supra*, that original discount is a form of interest.

In Point III of his brief (pp. 17-19), the taxpayer refers to 1939 Code, Section 115(c) and 1954 Code, Section 1241. Neither reference advances his argument that a provision for the treatment of amounts received in a transaction the same as if received in an exchange converts *all* amounts received in the transaction into capital gain. In each case, the liquidation of a corporation under Section 115(c) or surrender of a franchise under Section 1241, all that the statute provides is that capital gain shall be recognized to the same extent, and no more, as upon an exchange of stock or a franchise. That is exactly the meaning of Section 117(f). Under Section 115(c), a liquidation of a corporation involving the receipt of undistributed earnings and profits, results in capital gain only because the exchange of stock, at a price reflecting undistributed earnings and profits, results in capital gain. Additionally, it may be noted that a share of stock does not carry a right to receive income unless and until a dividend is declared; unlike the situation in cases illustrating the basic rule such as *Snow* or *Fisher*, no right to receive ordinary income out of the assets of the corporation accrues until the declaration of a dividend. (See Section 115(g) where a corporation cancels or redeems stock in a manner essentially equivalent to the distribution of a dividend). If a surrender of a franchise under Section 1241 also involved the transfer of accounts receivable, there is no doubt that the portion of the amounts received representing this item would be taxable as ordinary income, precisely because it

would be so taxed if received in an exchange of the franchise together with accounts receivable. *United States* v. *Snow*, 223 F. 2d 103 (C.A. 9th).

We have already dealt with the taxpayer's Point IV. The taxpayer's contention in Point V (pp. 21-27) that the 1954 Code changed the prior law to provide for ordinary income treatment of original discount, and only for instruments issued after December 31, 1954, rests upon several fallacies. *First*, it is not true that *Caulkins* was unquestioned before the enactment of the 1954 Code. As pointed out in our main brief (p. 18) the Commissioner had, prior to 1954, rejected *Caulkins* by confining it to its facts and ruling that the original discount on Israeli bonds was ordinary income whether payable in cash at intervals or at maturity. Rev. Rul. 119, 1953-2 Cum. Bull. 95. *Second*, the taxpayer's contention is also squarely contradicted by the Senate Committee Report, quoted at page 20, footnote 7 of our main brief. The taxpayer's reliance upon a single phrase in the Report of the House Committee (Br. 22) is misplaced, since the Senate Committee Report is a later and more precise statement, disclosing that the 1954 Code was intended to remove the doubt caused by the *Caulkins* decision, rather than to change the existing law.

The taxpayer's further contention (p. 25) in Point V, that by Section 1232(a)(2) Congress intended that the gain from the exchange or retirement of an obligation issued after March 1, 1954, should accrue only upon the disposition of the instrument, is errone-

ous. Section 1232(a)(2)(C)[4] makes it clear that these provisions regarding the reporting of original discount received at maturity are subject to the annual accrual of increases of cash value to an accrual basis taxpayer or a cash basis taxpayer who has elected to use the accrual basis to report this income prior to maturity. The taxpayer has omitted from his quotation of the relevant Treasury Regulations, the express proviso that any amounts of annual increments of original discount "previously includible" in a taxpayer's income are "not again includible in his gross income under Section 1232." Treasury Regulations on Capital Gains and Losses (1954 Code), Sec. 1.1232-3(e).

The same observation applies to 1954 Code Section 72(e) and (l) referred to by the taxpayer. (Br. 27.) These sections provide that the three year spread for reporting the receipt of taxable proceeds of an endowment contract shall apply to face-amount certificates. But this provision does not qualify the provisions for annual accrual of original discount

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[4] Section 1232(C) of the 1954 Code reads as follows:

SEC. 1232. BONDS AND OTHER EVIDENCES OF INDEBTEDNESS.

* * * *

(C) *Election as to inclusion.*—In the case of obligations with respect to which the taxpayer has made an election provided by section 454(a) and (c) (relating to accounting rules for certain obligations issued at a discount), this section shall not require the inclusion of any amount previously includible in gross income.

* * * *

(26 U. S. C. 1952 ed., Sec. 1232.)

of face-amount certificates, where the certificate, as here, is redeemable in fixed amounts of cash increasing at stated intervals, prior to maturity.

Finally, the taxpayer's attempt (Br. 28-30) to distinguish the main cases relied upon by the Commissioner fails, because the taxpayer has failed to meet the basic underlying proposition, for which these cases stand—that amounts representing ordinary income received upon the sale or exchange of a capital asset are taxable as ordinary income. It follows from this proposition that Section 117(f) simply means that such amounts shall be treated the same when received upon retirement, and that Section 117(f) does not convert this income into capital gain if received upon retirement, as contended by the taxpayer.

It is of no consequence that the Commissioner has chosen to relitigate the issue in the case at bar rather than in other cases where the Tax Court has followed the contrary *Caulkins* rule. As pointed out in our main brief (pp. 17-18), the Commissioner's contention that *Caulkins* was incorrect, and his intention to seek a judicial construction of Section 117(f), in

accord with the views advanced in this case, was long foreshadowed.

Respectfully submitted,

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AUGUST, 1959.

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No. 16395

United States
Court of Appeals
for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

J. I. MORGAN and FRANCES MORGAN,

Respondents.

Transcript of Record

Petition to Review a Decision of the Tax Court of the United States

Phillips & Van Orden Co., 4th & Berry, San Francisco, Calif.—5-1-59

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Tax Court of the United States

Docket No. 61346

J. I. MORGAN AND FRANCES MORGAN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1956

Mar. 12—Petition received and filed. Taxpayer notified. Fee paid.

Mar. 13—Copy of petition served on General Counsel.

Mar. 12—Request for Circuit hearing in Portland, Oregon, filed by taxpayer. Granted 3/13/56.

Apr. 26—Answer filed by respondent. Served 5/3/56.

Nov. 26—Hearing set 2/18/57—Portland, Oregon.

1957

Feb. 4—Notice of change of trial date to 2/19/57, Portland, Oregon.

Feb. 22—Trial had before Judge Withey on merits and petitioners' motion to consolidate with 61345. Motion granted. Motion (served) and Stip. of Facts filed at hearing. Briefs due 5/23/57; Replies due 6/22/57.

Mar. 18—Transcript of Hearing 2/22/57 filed.

May 6—Brief for Petrs. filed. Served 8/2/57.

1957

May 21—Motion for extension of time to July 23, 1957, to file brief, filed by respondent. Granted 5/22/57. Served 5/23/57.

July 22—Motion for extension of time to July 31, 1957, to file brief, filed by respondent. Granted 7/23/57.

July 25—Motion served.

July 31—Brief for Respondent filed. Served 8/2/57.

Aug. 27—Motion by respondent for extension of time to September 9, 1957, to file reply brief. Granted 8/29/57. Served 9/3/57.

Aug. 27—Reply Brief for Petitioners filed.

Sept. 9—Reply Brief for Respondent filed. Served 9/11/57.

1958

July 9—Findings of Fact and Opinion filed, Judge Withey. Dec. will be under R. 50.

Sept.18—Agreed computation, Rule 50, filed.

Sept.23—Decision entered, Judge Withey.

Dec. 11—Petition for review by U. S. C. A. 9th Circuit, filed by respondent.

Dec. 23—Proof of service of petition for review (sent counsel) filed.

Dec. 23—Proof of service of petition for review, Taxpayer (Frances Morgan), filed.

Dec. 23—Proof of service of petition for review, Taxpayer (J. I. Morgan), filed.

1959

Jan. 12—Motion for extension of time to March 11, 1959, to file record on review and docket petition for review filed by respondent.

1959

Jan. 13—Order, enlarging time to file record on review and docket petition for review to March 11, 1959. Served 1/14/59.

Feb. 12—Designation of contents of record on review, with proof of service thereon, filed.

Feb. 20—Proof of service of designation of contents of record on review, filed.

[Title of Tax Court and Cause.]

Docket Nos. 61345, 61346

FINDINGS OF FACT AND OPINION

1. Petitioner corporation acquired assets from its majority stockholder pursuant to an installment sales contract under the terms of which the consideration was to be paid in 7 annual installments. Title to the assets was reserved in the transferors until the full purchase price was paid. Held:

(a) That the transaction by which the assets were conveyed to the corporation was a sale and not an exchange of assets for stock within the meaning of section 112(b) (5), I.R.C. 1939, and the gain realized by the transferors is recognized.

(b) That the basis to the transferee corporation of the assets acquired by it is the cost of the assets. Section 113(a), I.R.C. 1939.

(c) That the corporation is entitled to deductions for interest paid to the transferors pursuant to the installment sales contract.

(d) That the payments of principal and interest received by J. I. Morgan from the corporation pursuant to the installment sales contract do not constitute a distribution of dividends.

2. The annual increment in the cash value of an "Accumulative Investment Certificate" held not taxable as ordinary income during the years in issue but taxable only as capital gain upon retirement at maturity. George Peck Caulkins, 1 T. C. 656, affd. 144 F. 2d 482, followed.

Appearances:

CARL E. DAVIDSON, ESQ., and
CHARLES P. DUFFY, ESQ.,
For the Petitioners.

JOHN D. PICCO, ESQ.,
For the Respondent.

Withey, Judge:

The respondent determined deficiences in petitioners' income tax for the years and in the amounts as follows:

Name	Docket No.	Fiscal year ended April 30	Deficiency
J. I. Morgan, Inc.	61345	1952	$11,601.55
		1953	60,872.75
		1954	56,610.97
J. I. Morgan and Frances Morgan	61346	1950	4,512.22
		1951	2,122.29
		1952	10,141.54
		1953	16,618.28
		1954	3,305.34

The issues presented for our determination are the correctness of the respondent's action (1) in determining that the acquisition of assets by the petitioner J. I. Morgan, Inc., in exchange for an installment contract constituted a nontaxable exchange of property for stock within the meaning of section 112(b)(5) of the Internal Revenue Code of 1939; (2) in determining that the assets acquired by J. I. Morgan, Inc., retain the same basis as they had in the hands of the transferors prior to the transfer; (3) in disallowing the deductions claimed by J. I. Morgan, Inc., for interest paid to J. I. Morgan pursuant to an installment contract; (4) in determining that petitioner J. I. Morgan received dividend distributions under the guise of payments of principal and interest from J. I. Morgan, Inc.; and (5) in determining that the increment in value of an "Accumulative Investment Certificate" is in the nature of interest and constitutes ordinary income to J. I. Morgan.

General Findings of Fact

Some of the facts have been stipulated and are found accordingly.

Petitioners J. I. Morgan and Frances Morgan are husband and wife residing at New Meadows, Idaho. They filed their joint income tax returns for 1950, 1951, 1952, 1953 and 1954 with the director of internal revenue for the district of Idaho. They kept their books of account and prepared their income tax returns on an accrual basis.

Petitioner J. I. Morgan, Inc. (sometimes hereinafter referred to as the corporation), is a corporation organized under the laws of the State of Idaho with its principal office located at New Meadows, Idaho. The corporation filed its income tax returns for 1952, 1953 and 1954 with the director of internal revenue for the district of Idaho. J. I. Morgan, Inc., kept its books of account and prepared its income tax returns on an accrual basis.

Issues 1, 2, 3 and 4.—Sale or Exchange Under Section 112(b) (5), I.R.C. 1939, and Related Issues.

Findings of Fact

For several years prior to 1946, J. I. Morgan was employed by the Boise Payette Lumber Company (sometimes hereinafter referred to as Boise Payette or the company) as its logging superintendent and master mechanic. He became dissatisfied with his employment in this capacity but Boise Payette desired to have him continue the logging of its timber. As a result, a written agreement, dated April 1, 1946, was executed by Boise Payette and Morgan, by the terms of which the latter agreed to log timber for the company as an independent contractor.

At the time of the execution of the agreement, Boise Payette and Morgan entered into a separate contract whereby Boise Payette agreed to sell Morgan its logging equipment, together with certain buildings and other property, for a total purchase price of $234,685.05. The logging equipment con-

stituted substantially all of the equipment which the company theretofore had used in its logging operations. The purchase price (equivalent to Boise Payette's book value plus 20 per cent) was to be paid by charges against the operating account of J. I. Morgan at the rate of $1.75 per 1,000 feet of logs produced by Morgan's logging operations. No interest was payable on the deferred balance. The contract was fully performed and title to the land and equipment was transferred to Morgan on or about March 21, 1950. Upon execution of the contract, Morgan's operating account with the company was charged with additional items amounting to $109,-647.84, making a total cost to J. I. Morgan of $344,-332.89. After April 1, 1946, the logging operations for Boise Payette Lumber Company were conducted by Morgan as sole proprietor, with Edward N. Morgan employed as equipment foreman and Edward S. Millspaugh employed as logging superintendent. Edward N. Morgan and Edward S. Millspaugh were compensated at an agreed rate based on the number of feet of logs produced. In the spring of 1950, however, an arrangement was made whereby J. I. Morgan was to receive 60 per cent of the net income of the logging operations and Edward N. Morgan and Millspaugh were each to receive 20 per cent of net income.

J. I. Morgan, Edward N. Morgan and Millspaugh had worked together for a number of years and J. I. Morgan had developed great confidence in their ability and desired to retain their services.

However, Edward N. Morgan and Millspaugh were not satisfied to continue as employees of J. I. Morgan and demanded a proprietary interest in the business.

J. I. Morgan, Inc., was incorporated under the laws of the State of Idaho on November 29, 1948, with an authorized issue of common capital stock of 2,500 shares at a par value of $100 each. Until June 1, 1950, only 3 shares of stock in J. I. Morgan, Inc., were subscribed—one each by J. I. Morgan, Frances Morgan and Edward N. Morgan. The corporation was inactive until after October 1, 1950.

On June 5, 1950, a special meeting of the board of directors of J. I. Morgan, Inc., was held for the purpose of discussing the advisability of subscribing for additional capital stock of the corporation in the amount of $10,000. The directors were J. I. Morgan, Frances C. Morgan and Edward N. Morgan. J. I. Morgan indicated a willingness to subscribe for $6,000 worth of stock of the corporation and Edward N. Morgan and Millspaugh each agreed to subscribe for $2,000 worth of the corporation stock. Consequently, resolutions were adopted by the directors authorizing J. I. Morgan, Inc., to issue and deliver 59 shares of the capital stock of the corporation to J. I. Morgan, 1 share to Frances Morgan and 20 shares each to Edward N. Morgan and Edward S. Millspaugh in consideration of $100 per share. The capital stock of the corporation was paid for on or about October 1, 1950, at which time it was issued and delivered in accordance with the corporate

resolution. The remaining 2,400 shares of the capital stock remain unsubscribed. Edward N. Morgan and Millspaugh were agreeable to continuing as 20 per cent stockholders in J. I. Morgan, Inc., but they were unwilling to accept a smaller proportionate interest therein.

The stockholders discussed the possibility of expanding the operations of the corporation by engaging in road construction, land clearing and the milling of jack pine, but they eventually rejected those suggestions. J. I. Morgan also contemplated leasing to the corporation his logging equipment but the idea finally was abandoned. The initial capital investment in the amount of $10,000 would have been sufficient to enable the corporation to continue its operations in the event the directors had decided to rent the logging equipment of J. I. Morgan.

After deciding to sell the logging equipment to the corporation, J. I. Morgan and Frances Morgan submitted a written offer to the corporation to sell to it certain real and personal property, including logging equipment, for $500,000, together with the assumption by the corporation of certain of the liabilities of J. I. Morgan in the amount of $129,-682.55. The offer was accepted by the directors of J. I. Morgan, Inc., on September 25, 1950.

On or about October 1, 1950, J. I. Morgan and Frances C. Morgan executed a written contract of sale with J. I. Morgan, Inc., pursuant to which they

sold certain real estate, logging equipment, machine shop equipment, office equipment, and other personal property to the corporation. The contract provided, in part, as follows:

It is expressly and specifically agreed that title to said property, or any part thereof, or any additions thereto or improvements thereon, shall not pass from the Sellers to the Purchaser until the entire purchase price shall have been paid in full, and that no right, title or interest, legal or equitable, in the property aforesaid, or any part thereof, shall vest in the Purchaser until the delivery of the deed and bill of sale by the Sellers, or until the payment of its purchase price in full, and at the times and in the manner herein provided.

The contract called for fixed payments to be made to the transferors without regard to the earnings of the corporation. No agreement was made by the transferors not to enforce collection of the payments and the corporation was required at its own expense to maintain the property, to bear the risk of loss and keep the transferred assets insured for the benefit of both the buyer and seller as their interests might appear.

The adjusted basis to J. I. Morgan of the depreciable assets which were transferred by him to J. I. Morgan, Inc., on October 1, 1950, was $177,634.69. The adjusted basis in the hands of J. I. Morgan of all the assets sold to the corporation on October 1, 1950, was $214,377. The property

and equipment transferred to J. I. Morgan, Inc., pursuant to the contract of sale executed on October 1, 1950, had a fair market value on that date of not less than $629,682.55.

In addition to the aforementioned property, J. I. Morgan also transferred to the corporation without additional consideration, cash in the payroll account in the amount of $12,500; inventory of logs, $1,000; inventory in warehouse, $23,242.31; roads constructed at a cost of $27,432.96; and bunk and cook houses constructed at a cost to J. I. Morgan of $11,970.67. Further, J. I. Morgan assigned his logging contract with Boise Payette Lumber Company to J. I. Morgan, Inc., without additional consideration.

The opening journal entries on the books of the corporation as of October 1, 1950, were as follows:

(1)

		Dr.	Cr.
10-1-50	Cash	$ 10,000.00	
	Capital stock		$ 10,000.00
	To record capital stock issued for cash as follows:		
	J. I. Morgan	$ 6,000.00	
	Ed Millspaugh	2,000.00	
	Ed Morgan	2,000.00	
	Total	$10,000.00	

(2)

10-1-50	Cash in bank—payroll account		$ 12,500.00	
	Accounts[1] receivable—general		14,520.56	
	Accounts[1] receivable—petty ledger		1,679.93	
	Inventory—logs		1,000.00	
	Inventory—warehouse		23,242.31	
	Plant, property and equipment		537,336.12	
	Garden Valley roads		27,432.96	
	Bunk and cook houses		11,970.67	
	Invoices payable:			
	Equipment	$ 8,215.59		
	#23 Purchases	18,298.06		26,513.65
	Costello & Miller			6,000.00
	Payroll payable:			
	Bonuses—Ed M. & Ed M.	$ 1,355.65)		
	—Dec. 31	6,528.75)		
	—vacation	8,368.50)		$ 16,252.90
	Boise Payette Lumber Company			77,041.49
	Accrued property taxes			3,874.51
	Note payable J. I. Morgan			500,000.00

To record purchase of business from J. I. Morgan, paying for same with note

[1]The receivables noted above were inserted by inadvertence. These assets actually were retained by J. I. Morgan.

The balance sheet of the corporation as of October 1, 1950, was as follows:

Assets:		
Cash in bank		$ 10,000.00
Cash in bank, payroll a/c		12,500.00
[1]Accounts receivable		14,520.56
[1]Petty ledger receivables		1,679.93
Inventory, logs		1,000.00
Inventory, warehouse		23,242.31
Plant, property, equipment	$576,739.75	
Depreciation reserve		576,739.75
TOTAL		$639,682.55
Liabilities & Capital:		
Accounts payable		$ 26,513.65
Accrued expenses payable		26,127.41
Boise Payette operating a/c payable..		77,041.49
Note and mortgage payable		500,000.00
Capital stock		10,000.00
TOTAL		$639,682.55

A down payment of $2,000 was paid by the corporation to J. I. Morgan during 1950 on the price of the assets acquired from him. The balance due pursuant to the installment sales contract, together with interest thereon at the rate of 2 per cent per annum beginning May 1, 1951, was to be paid as follows:

[1]The receivables noted above were inserted by inadvertence. These assets actually were retained by J. I. Morgan.

$75,000.00, together with interest then due, on or before the 31st day of December, 1952; and a like sum of

$75,000.00, together with interest on the unpaid balance, on or before the 31st day of December of the years 1953, 1954, 1955, 1956 and 1957, and the remaining balance of

$50,000.00, together with interest due thereon, on or before the 31st day of December, 1958.

Because of the expanded logging operations and the necessity of purchasing additional equipment, J. I. Morgan agreed, pursuant to a written agreement dated December 19, 1952, to extend the time for payment of the first installment due under the contract. Thereafter, the corporation made a payment of $30,860 on December 31, 1953, under the contract as modified, and 14 payments, aggregating $43,123.12, from May 1, 1954, to August 31, 1955. The respondent determined that the foregoing payments for the years 1950, 1953 and 1954 constituted taxable dividends paid to petitioners J. I. Morgan and Frances Morgan. During 1954 and 1955, J. I. Morgan, Inc., also made payments on its open account with J. I. Morgan totaling $77,876.88.

On or about July 19, 1955, a revenue agent commenced an examination of the income tax liabilities of the petitioners. During the course of his examination, the agent proposed to treat the transfer of assets from J. I. Morgan to the corporation pursuant to the installment contract as a non-

taxable exchange under the provisions of section 112(b)(5) of the 1939 Code. Consequently, after August 31, 1955, no further payments were made by the corporation pending final settlement of the present controversy.

Beginning on October 1, 1950, and continuing through the corporation's fiscal year ended April 30, 1954, J. I. Morgan, Inc., claimed deductions for depreciation in the following amounts:

Fiscal year ended April 30	Amount
1951	$ 47,732.13
1952	174,846.57
1953	118,523.78
1954	180,943.54

J. I. Morgan, Inc., claimed deductions for interest paid to J. I. Morgan and Frances Morgan pursuant to the installment sales contract for the years and in the amounts as follows:

Fiscal year ended April 30	Amount
1952	$9,960.00
1953	9,960.00
1954	9,277.62

The respondent determined that the foregoing payments to petitioners J. I. Morgan and Frances Morgan constituted taxable dividends. No dividends have been declared to date by J. I. Morgan, Inc.

In their joint income tax return for 1950, petitioners J. I. Morgan and Frances Morgan indicated their intention to report on the installment

basis the taxable gain realized from the transfer of assets to the corporation. They accordingly reported capital gains resulting from the foregoing transaction as follows:

Year	Amount
1950	$ 642.73
1953	9,386.85
1954	3,864.03

J. I. Morgan, Inc., reported its net income or loss for each of the years in question, before claiming a net operating loss deduction, as follows:

Fiscal year ended April 30	Amount
1951	($30,198.80)
1952	(38,632.00)
1953	33,248.89
1954	22,133.16
1955	52,886.89
1956	44,556.11

The books of account of the corporation reflect the following amounts of property, plant and equipment (excluding roads) and reserves for depreciation:

	Property, plant and equipment	Reserve for depreciation
September 30, 1950	$ 549,306.79	
Net additions	76,916.31	$ 62,732.13
April 30, 1951	626,223.10	62,732.13
Net additions	121,824.96	98,069.59
April 30, 1952	748,048.06	160,801.72
Net additions	50,808.77	110,389.33

April 30, 1953	798,856.83	271,191.05
Net additions	166,514.20	129,384.18
April 30, 1954	965,371.03	400,575.23
Net additions	68,046.93	149,076.14
April 30, 1955	1,033,417.96	549,651.37
Net additions	225,001.47	143,659.10
April 30, 1956	$1,258,419.43	$693,310.47

In addition to making the foregoing expenditures for property, plant, and equipment, J. I. Morgan, Inc., expended substantial amounts for the construction of logging roads during the years in issue.

The corporation had the following number of employees at the end of each of the following years:

Year	Number
1950	83
1951	105
1952	121
1953	112
1954	111
1955	129
1956	135

The net profit or loss of the corporation for the taxable years 1950 through 1955, inclusive, as shown on its income tax returns for those years was as follows:

Year	Net Profit or loss
1950	($31,198.80)
1951	(41,032.00)
1952	(1,308.78)
1953	28,582.79
1954	52,886.89
1955	44,556.11

OPINION

The respondent has determined that the installment contract executed by J. I. Morgan and Frances C. Morgan on October 1, 1950, in fact represented equity capital; and that the acquisition of assets by the corporation in exchange for the installment contract constitutes a nontaxable exchange of property solely for stock within the meaning of section 112(b)(5) of the 1939 Code.[1] Consequently, the respondent further determined that the assets acquired by J. I. Morgan, Inc., retain the same basis as they had in the hands of

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[1]Sec. 112. Recognition of Gain or Loss

* * *

(b) Exchanges Solely in Kind.

* * *

(5) Transfer to corporation controlled by transferor. No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange. Where the transferee assumes a liability of a transferor, or where the property of a transferor is transferred subject to a liability, then for the purpose only of determining whether the amount of stock or securities received by each of the transferors is in the proportion required by this paragraph, the amount of such liability (if under subsection (k) it is not to be considered as "other property or money") shall be considered as stock or securities received by such transferor.

the transferors immediately prior to the exchange under section 113(a)(8) of the 1939 Code and that the amounts paid by the corporation to the transferors were in fact dividend distributions.

Petitioners contend that the execution of the installment contract on October 1, 1950, constituted a sales transaction and created a valid debtor-creditor relationship between the transferors and the transferee corporation. The petitioners therefore contend that the gain realized on the transaction should be recognized and that the corporation is entitled to utilize the fair market value of the assets at the time of the transfer as the proper basis. Section 113(a), 1939 Code.

In support of their position the petitioners rely on our decision in Warren H. Brown, 27 T.C. 27. In that case the taxpayers contributed assets worth $270,000 to a newly formed corporation and subsequently conveyed to the corporation assets valued at $605,138.75, pursuant to an installment sales contract reserving title in the transferors until the full purchase price was paid. The business purpose underlying the execution of the installment sales contract was the refusal of one of the transferors to accept the risks attendant upon a further capital investment in the new corporation. Under local law, the reservation in the transferor of title to personal property sold under an installment sales contract created in the transferor a right to possession and ownership superior to the rights of all other creditors of the transferee. The installments

due the transferors during the years there in issue were paid by the corporation with interest thereon. Such payments were not dependent upon the earnings of the corporation.

Further, the record there did not disclose an agreement not to enforce the collection of payments from the corporation. The contract price was equal to the fair market value of the assets transferred thereunder. We there held that the transaction in question constituted a bona fide sale by the stockholder to the corporation, rather than a contribution to capital.

The factual situation involved in Warren H. Brown, supra, closely parallels the facts here presented, and we are of the opinion that our decision in that case is controlling here.

On October 1, 1950, J. I. Morgan and Frances C. Morgan executed an installment contract by the terms of which they agreed to sell to J. I. Morgan, Inc., certain real and personal property for $500,000, together with the assumption by the corporation of liabilities of J. I. Morgan in the amount of $129,682.55. Pursuant to the terms of the contract of sale, title to all of the transferred property was retained by J. I. Morgan and Frances C. Morgan until the purchase price, with interest at the rate of 2 per cent per year, is paid in full. Sixty per cent of the stock of the corporation was owned by J. I. Morgan and Frances C. Morgan, and 20 per cent of the stock was owned by Edward S. Millspaugh and 20 per cent by Edward N. Morgan.

J. I. Morgan, Edward N. Morgan and Edward S. Millspaugh had worked together as a unit for some years, and J. I. Morgan had developed considerable confidence in the ability of Edward N. Morgan and Millspaugh and consequently desired to retain their services. However, Edward N. Morgan and Millspaugh were not satisfied to continue as employees of J. I. Morgan and demanded a proprietary interest in the business. Accordingly, if Edward N. Morgan and Millspaugh were to continue in the logging operation with J. I. Morgan, a change in the form of business appeared necessary. As a result, J. I. Morgan, Edward N. Morgan and Millspaugh made cash contributions to the corporation in the amounts of $6,000, $2,000, and $2,000, respectively, in exchange for stock in the foregoing amounts.

The original capital investment in the amount of $10,000 would have been adequate to continue the operations of the business if J. I. Morgan had leased to the corporation his logging equipment as he had at one time considered. After abandonment of the idea of leasing the logging equipment to J. I. Morgan, Inc., it became apparent that it would be necessary for the corporation to acquire the equipment if it was to continue a logging operation. If J. I. Morgan and Frances C. Morgan had contributed the logging equipment to the corporation as capital, they would have acquired 99.38 per cent of the stock of the corporation, and Edward N. Morgan and Millspaugh each would have received

only 0.31 per cent of the stock. Neither Edward N. Morgan nor Millspaugh would have consented to the acquisition of only a $.31 per cent interest in the corporation. Therefore, the decision to transfer the logging equipment owned by J. I. Morgan to the corporation pursuant to an installment contract reserving title in the transferors appears clearly to have been made for an independent business purpose.

Moreover, we are convinced from the testimony of J. I. Morgan, together with the circumstances surrounding the execution of the installment contract and the transfer of the assets thereunder, that the transaction was not motivated by tax considerations. At the time of execution of the installment contract on October 1, 1950, the directors of the corporation intended to make the agreed payments to J. I. Morgan, and J. I. Morgan did not intend to waive the collection of such payments. Their intention at that time cannot be vitiated by changed circumstances or unforeseen difficulties. Although J. I. Morgan subsequently on December 19, 1952, agreed to extend the time for the corporation's payment of the first installment due under the contract because of the necessity of purchasing additional equipment to handle the expanded logging operations, the corporation thereafter on December 31, 1953, made a payment of $30,860 and subsequently made 14 payments, totaling $43,123.12, from May 1, 1954, to August 31, 1955.

The contract called for fixed payments to be made

to J. I. Morgan without regard to the earnings of the corporation. Further, the total price in the amount of $629,682.55 to be paid by the corporation for the assets transferred to it pursuant to the installment contract was equal to the fair market value of the assets so transferred.

In addition, as in Warren H. Brown, supra, the property was not placed at the risk of the business. Under applicable Idaho law, the reservation in the transferors of title to personal property sold under an installment sales contract creates in the transferors a right of possession and ownership superior to the rights of all other creditors of the transferee. Idaho Code 1947, secs. 64-801, 64-802; Sparkman vs. Miller-Cahoon Co., 282 Pac. 273. The real estate included in the contract of sale remains the property of the transferors so long as they retain record title. Idaho Code 1947, sec. 55-812.

The respondent insists that the existence here of a predominant debt structure (50 to 1 debt-stock ratio) on the part of the corporation places the petitioners in an untenable position. However, we are unable to accept the proposition that this capitalization standing alone is sufficient to justify the treatment of an installment sales contract as evidence of equity capital. See Sheldon Tauber, 24 T.C. 179; Harry F. Shannon, 29 T.C. .... (Jan. 28, 1958). Further, the capitalization of the corporation does not appear to have been inadequate. Although it sustained losses during the first three

years of its operation, during 1953, 1954 and 1955, its net profits as disclosed on its Federal income tax returns amounted to $28,582.79, $52,886.89 and $44,556.11, respectively. Throughout the period 1950-1955, the corporation expended substantial sums in acquiring additional property, equipment, and plant facilities, and in the construction of logging roads. In addition, it increased the number of its employees from 83 at the end of 1950 to 135 at the end of 1956. There is no indication in the record that J. I. Morgan, Inc., acquired additional funds either through debt or equity financing after commencing operations in 1950, nor is there evidence of any attempt to do so.

Petitioner's ability to conduct its operations with small capital is accounted for at least in part by the fact that its principal asset, outside of its logging equipment, was a contract with Boise Payette Lumber Company to perform all of its logging operations. Aside from the fact that the record discloses a long and friendly relationship between J. I. Morgan and Boise Payette, it is further apparent that the latter company desired to divest itself of its logging operations and to retain the services of J. I. Morgan as an independent contractor to perform the function. It seems clear that it was to the best interest of Boise Payette, from that standpoint, and from the further standpoint that it was Morgan's principal creditor, to further the business enterprise of the corporation and to do whatever was necessary to prevent it from falling into financial difficulties.

The respondent relies heavily on our decision in Gooding Amusement Company, 23 T.C. 408, affd. 236 F.2d 159. The situation there presented involved the incorporation of a partnership pursuant to which the partnership assets were transferred to the new corporation in exchange for stock and notes. The note holders were partners in the transferor and were in control of the corporation immediately after the exchange. Unlike the sales contract here in question, which by reserving title to the assets in the transferors until the purchase price is paid gives them rights superior to those of other creditors, the notes issued to the transferor by the Gooding Amusement Company were subordinated to the claims of other creditors. Moreover, the majority of the notes there issued remained unpaid long after maturity, whereas the record herein discloses that substantial payments with interest have been made to J. I. Morgan by the corporation. In addition, we placed reliance on the failure of the taxpayers in Gooding Amusement Company, supra, to show that nontax consideration motivated the decision to accept the short-term judgment notes of the corporation in exchange for a portion of the assets transferred to it. We have described heretofore the business reasons motivating the execution of the installment sales contract here in issue. In Gooding Amusement Company, supra, we held that no gain or loss was recognized under the provisions of section 112(b)(5) of the 1939 Code on the ground that the notes received by the transferor in exchange for a portion of the

assets transferred to the corporation were actually evidence of equity capital. In our opinion, the situation here presented is factually distinguishable from the circumstances involved in Gooding Amusement Company, supra.

In view of the form of the contract here in issue, the reservation of title in the transferors until the full purchase price is paid, the business considerations underlying the execution of the installment sales contract, the superior position of the claims of J. I. Morgan to the claims of other corporate creditors, the contract provision requiring certain fixed payments to be made to the transferors without regard to corporate earnings, the absence of an agreement not to enforce collection, the provision requiring the payment of interest to J. I. Morgan at a reasonable rate, the fact that the contract price was equal to the fair market value of the assets transferred thereunder, and the substantial payments of principal and interest to J. I. Morgan under the contract convince us that the transaction which was completed on October 1, 1950, constituted a bona fide sale to the corporation rather than a contribution to corporate capital.

Under the installment sales contract, the corporation is liable for the payment of a fixed purchase price. It has made an investment in the logging equipment and is required under the contract to maintain the property, to keep it insured, and to bear the risk of loss. Thus, despite the fact that J. I. Morgan, Inc., does not hold legal title to the

property, the burden of depreciation falls upon it. E. J. Murray, 21 T.C. 1049. Consequently, under section 113(a) of the 1939 Code, the basis for depreciation of the assets, the right to possession and use of which were acquired by the corporation on October 1, 1950, is the cost of the assets to the corporation. In addition, the corporation is entitled to the deductions claimed by it for interest paid to the transferors pursuant to the installment sales contract during the fiscal years ended April 30, 1952, 1953, and 1954. We further hold that the amounts received by the transferors from the corporation during the years in issue as payments of principal and interest pursuant to the installment sales contract do not constitute a distribution of dividends.

Issue 5—Investment Certificate

Findings of Fact

On or about August 10, 1937, J. I. Morgan acquired an "Accumulative Investment Certificate," Series F-232668, from Investors Syndicate (presently known as Investors Diversified Services, Inc.) of Minneapolis, Minnesota. Under the terms of the certificate, the issuing company agreed to pay to Morgan (with certain options) at the expiration of 15 years, an amount in excess of his aggregate payments. On September 28, 1952, J. I. Morgan exercised one of the available options to extend the certificate for an additional period of not more than 10 years.

The following is a detailed statement of the foregoing "Accumulative Investment Certificate":

INVESTORS SYNDICATE
Minneapolis, Minnesota

Name Changed on 3-30-49 to: Investors Diversified Services, Inc.

Number—Series F232668

Dated 8-10-37.

Annual Advance Payment for 15 years ..... $ 600.00

Maturity in 15 years (option 13 elected 9-28-52 to continue not more than 10 years).

With optional settlement privileges.

Cash Value for each $25.00 Maturity	Year	To	Cash Value end of year	Paid In	Excess of Cash Value over amounts Paid In	Yearly Increase
$ 44	1		$ 220	$ 600		
134	2		670	1,200		
264	3		1,320	1,800		
400	4		2,000	2,400		
540	5		2,700	3,000		
700	6		3,500	3,600		
860	7		4,300	4,200		
1,024	8		5,120	4,800		
1,200	9		6,000	5,400		
1,418	10	8-10-47	7,090	6,000		
1,600	11	8-10-48	8,000	6,600		
1,810	12	8-10-49	9,050	7,200	$1,850	
2,020	13	8-10-50	10,100	7,800	2,300	$450
2,240	14	8-10-51	11,200	8,400	2,800	500
2,500	15	8-10-52	12,500	9,000	3,500	700
2,724	16	8-10-53	13,620	9,600	4,020	520
2,958	17	8-10-54	14,790	10,200	4,590	570

Opinion

The respondent has determined that the annual increases in the excess of the cash value of an Investors Syndicate certificate over the amounts paid in represent interest taxable as ordinary income during the years of increase. The amounts determined by respondent to be taxable income to petitioners for the years 1950, 1951, 1952, 1953, and 1954 are $450, $500, $700, $520, and $570, respectively.

Petitioners contend that the annual increment in the cash value of such a certificate is not properly taxable during the years of increase, but is taxable only upon retirement at maturity as capital gain under section 117(f) of the 1939 Code.[2]

An identical issue involving the same type of certificate issued by Investors Syndicate was presented in George Peck Caulkins, 1 T.C. 656, affd. 144 F.2d 482. We there held that the certificate owned by the taxpayer constituted an evidence of indebtedness within the meaning of section 117(f)

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[2]Sec. 117. Capital Gains and Losses.

* * *

(f) Retirement of Bonds, etc.—For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

of the 1939 Code, and that the annual increment in the cash value of the certificate should properly be reported as capital gain upon retirement at maturity. Our decision in that case is squarely in point here. We accordingly hold that under section 117(f) of the 1939 Code and section 1232(a)(1) of the 1954 Code, insofar as here applicable, the amounts in question are taxable to petitioners as capital gain at the maturity of the certificate, rather than as interest income during the years of increase.

Reviewed by the Court.

Decisions will be entered under Rule 50.

Murdock, J., dissenting:

I disagree with that part of this opinion in which it is held that the petitioner is entitled to depreciation on the depreciable assets acquired from the Morgans on October 1, 1950, based upon a "cost" of those assets equal to their fair market value on October 1, 1950, which is stated to be "the date of acquisition." The petitioner got possession of the assets at that time and began to use them in its business but it did not acquire the assets and was not to receive legal title to them until the purchase price was fully paid. The fact that this petitioner was to maintain the property, keep it insured and bear the risk of loss is no justification for giving it depreciation on the assets. These items are taken care of by deductions other than for depreciation.

However, it acquired an equitable interest in and is entitled to some depreciation on the assets. The Commissioner has allowed some depreciation and apparently does not seek to cut down on the amount allowed. Therefore, the Commissioner's determination on this point might be left undisturbed.

This petitioner took deductions for depreciation as follows:

1951	$ 47,732.13
1952	174,846.57
1953	118,523.78
1954	180,943.54
Total	$522,046.02

The purpose of deductions for depreciation is to return to the taxpayer, tax free, the cost or basis to it of property being consumed or worn out in its business. The statute provides for the deduction of "a reasonable allowance" for depreciation.

The petitioner was to assume liabilities of Morgan in the amount of $129,682.55, but the record does not show what, if anything, the petitioner ever did to discharge those obligations. It was to pay, in addition, $500,000 in cash, but it paid only $2,000 in 1950 and $30,860 on December 31, 1953, on account of that cash purchase price up to the close of the taxable years. Later it paid a little more and then further payments were called off by the parties. Cf. Lloyd H. Redford, 28 T.C. 773. The deductions claimed by the petitioner, which deduc-

tions or substanial equivalents the opinion allows, would be far in excess of reasonable allowances for depreciation to this petitioner under the circumstances of this case.

If this case cannot be disposed of by making no change in the depreciation allowed by the Commissioner in determining the deficiency and a decision on the merits is necessary, then it seems to me that the petitioner is limited by its economic interest in the depreciable assets.

The Murray case cited and the cases relied on in the Murray case held that the taxpayer had either equitable or legal title to the property which was being depreciated. I know of no case which holds that a taxpayer could recover such amounts as this taxpayer is being allowed to recover where its actual investment in that property is but a small fraction of the depreciation deductions and, possibly, may never be increased.

Raum, J., agrees with this dissent.

Pierce, J., dissenting:

The situation herein presented is not one wherein the corporation acquired title to the machinery and equipment subject to a purchase money mortgage. Cf. Crane v. Commissioner, 333 U. S. 1. To the contrary, the agreement which the corporation executed merely gave it possession and use of the property, on the following terms:

> It is expressly and specifically agreed that title to said property, or any part thereof, or any additions thereto or improvements thereon, shall not pass from the Sellers to the Purchasers until the entire purchase price shall have been paid in full, and that no right, title or interest, legal or equitable, in the property aforesaid, or any part thereof, shall vest in the Purchaser until the delivery of the deed and bill of sale by the Sellers, or until the payment of its purchase price in full, and at the times and in the manner herein provided.

Thus the agreement was merely a contract to purchase; and the corporation obtained no depreciable interest in the property.

In the alternative, if the agreement was sufficient to convey any interest in the property, the transaction was an exchange under section 112 (b)(5) of the 1939 Code, with a consequent carry-over of the transferor's basis. The $10,000 of capital paid into the corporation was obviously an inadequate capitalization to permit "purchase" of the property. The corporation should be considered a "thin" corporation; and the transfer of the property to it should be considered a contribution of additional equity capital.

Atkins, J., agrees with this dissent.

Filed July 9, 1958.

Served July 9, 1958.

[Title of Tax Court and Cause.]

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION

The attached computation is submitted, on behalf of the respondent, in compliance with the Court's opinion determining the issues in this proceeding. Said computation provides as follows:

(1) That there are deficiencies in income tax due from the petitioners for the taxable years 1950 and 1953 in the amounts of $7.22 and $410.78, respectively.

(2) That there are no deficiencies in income tax due from the petitioners for the taxable years 1951, 1952 and 1954 and that there are no overpayments for said taxable years.

The computation is submitted without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court pursuant to the statute in such cases made and provided.

/s/ ARCH M. CANTRALL,
Chief Counsel,
Internal Revenue Service.

Of Counsel:

MELVIN L. SEARS,
Regional Counsel,

JOHN D. PICCO,
Attorney, Internal Revenue Service.

Without prejudice to the right to appeal, it is agreed that the attached computation is in accordance with the opinion of the Tax Court in the above-entitled proceeding.

/s/ CHARLES P. DUFFY,
Counsel for Petitioners.

ARC-AP:SF
P:MBF

COMPUTATION STATEMENT

RULE 50

In re: J. I. and Frances Morgan
New Meadows, Idaho

Docket No. 61346

Income Tax

Year	Deficiency
1950	$ 7.22
1951	None
1952	None
1953	410.78
1954	None
Total	$418.00

The details supporting the above computation are set forth in the attached pages 2 to 14, inclusive.

Taxable Year Ended December 31, 1950
Schedule 1
Adjustments to Income

Net income disclosed by statutory notice of deficiency dated December 22, 1955 ..	$33,373.04
Net income adjusted	30,990.11
Adjustment	$ 2,382.93

Reduction:		
(a) Dividends	$2,000.00	
(b) Increase in cash value	450.00	
(c) Accrued interest	592.48	$ 3,042.48
Addition:		
(d) Capital gain	$ 659.55	659.55
		$ 2,382.93

Schedule 1-a
Explanation of Adjustments

(a) The opinion of the Tax Court of the United States promulgated July 9, 1958 is that the transaction between the petitioner and J. I. Morgan, Inc. was a sale and the amount received in payment is not a dividend.

(b) The annual increment in the cash value of an "Accumulative Investment Cerificate" is not taxable as ordinary income.

(c) The respondent conceded that accrued interest in the amount of $592.48 was not includible in income.

(d) Capital gain on installment payment of $2,000.00 received from corporation as shown in Exhibit "A" attached.

Taxable Year Ended December 31, 1950
Schedule 2
Computation of Tax

Net income adjusted		$30,990.11
Less: Personal exemptions		1,200.00
Income subject to tax		$29,790.11
One-half of taxable income		$14,895.06
Tentative tax on $14,895.06		$ 4,680.68
Tax reduction: 13% of $ 400.00	$ 52.00	
9% of 4,280.68	385.26	437.26
One-half of income tax		$ 4,243.42

Tax liability		$ 8,486.84
Liability disclosed by return—		
A/c No. 300027	$4,998.52	
A/c No. 511782	3,481.10	8,479.62
Deficiency		$ 7.22

Schedule 2-a
Statement of Account

Liability		$ 8,486.84
Assessed:		
Estimated Tax—		
Credit from 1949—9105029	$ 711.86	
ES No. 1005113	2,400.00	
Form 1285—9/13/56—511782	3,481.10	
Paid on return	1,886.66	8,479.62
Deficiency in assessment		$ 7.22
Liability		$ 8,486.84
Paid: Credit from 1949	$ 711.86	
June 12, 1950	700.00	
Sept. 1, 1950	700.00	
Feb. 1, 1951	1,000.00	
May 21, 1951	1,886.66	
Sept. 27, 1956	3,481.10	8,479.62
Deficiency in payment		$ 7.22

Taxable Year Ended December 31, 1951
Schedule 3
Adjustments to Net Income

Net income disclosed by statutory notice of deficiency dated December 22, 1955 ..	$29,605.23
As adjusted	28,512.75
Adjustment—reduction	$ 1,092.48

Reduction:		
(a) Increase in cash value	$ 500.00	
(b) Accrued interest	592.48	$ 1,092.48

Schedule 3-a
Explanation of Adjustments

(a) The opinion of the Tax Court of the United States promulgated July 9, 1958 is that the annual increment in the cash value of an "Accumulated Investment Certificate" is not taxable as ordinary income.

(b) The respondent conceded that accrued interest in the amount of $592.48 was not includible in income.

Schedule 4
Computation of Tax

Net income adjusted		$28,512.75
Less: Personal exemptions		1,200.00
Income subject to tax		$27,312.75
Income tax liability		$ 8,376.48
Liability disclosed by return—		
A/c No. BR-300	$6,744.24	
Assessment 9/13/56—511783	1,632.24	8,376.48
Overassessment/Deficiency		None

Taxable Year Ended December 31, 1951
Schedule 4-a
Statement of Account

Liability			$ 8,376.48
Assessed:			
Estimated tax paid—1003255..	$7,500.00		
Amount refunded—BR-300	755.76	$6,744.24	
Assessment—511783 9/28/56 ..		1,632.24	8,376.48
Deficiency to be assessed ..			None

Liability			$ 8,376.48
Paid: Estimated tax paid—			
3/20/51	$ 500.00		
6/20/51	500.00		
9/19/51	500.00		
1/25/52	6,000.00	$7,500.00	
Amount refunded		(755.76)	
Additional assessment—			
9/27/56		1,632.24	8,376.48
Deficiency in payment			None

Taxable Year Ended December 31, 1952
Schedule 5
Adjustments to Net Income

Net income disclosed by statutory notice of deficiency dated December 22, 1955..		$47,017.32
As adjusted		33,694.39
Adjustment — reduction		$13,322.93
Reduction:		
(a) Increase in cash value	$ 700.00	
(b) Accrued interest	592.47	
(c) Rental income	12,030.46	$13,322.93

Taxable Year Ended Deember 31, 1952
Schedule 5-a
Explanation of Adjustments

(a) The opinion of the Tax Court of the United States promulgated July 9, 1958, is that the annual increment in the cash value of an "Accumulated Investment Certificate" is not taxable as ordinary income.

(b) The respondent conceded that accrued interest in the amount of $592.48 was not includible in income.

(c) The respondent abandoned the position that this amount was a taxable dividend to the petitioners.

Schedule 6
Computation of Tax

Net income adjusted		$33,694.39
Less: Personal exemptions		1,200.00
Income subject to tax		$32,494.39
Income tax liability		$11,908.86
Liability disclosed by return—		
A/c No. AF(7) 205	$9,769.90	
23c—9/28/56—511784	2,138.96	$11,908.86
Deficiency		None

Taxable Year Ended December 31, 1952
Schedule 6-a
Statement of Account

Liability		$11,908.86
Assessed:		
Estimated Tax—EP 6194	$6,500.00	
AF-7-205	1,844.90	
511784	2,138.96	
Withheld tax	1,425.00	11,908.86
Deficiency to be assessed		None
Liability		$11,908.86
Paid: Mar. 31, 1952	$ 500.00	
June 19, 1952	500.00	
Sept. 18, 1952	500.00	
Jan. 26, 1953	5,000.00	
July 21, 1953	1,844.90	
Sept. 27, 1956	2,138.96	
Withheld tax	1,425.00	11,908.86
Deficiency in payment		None

Taxable Year Ended December 31, 1953
Schedule 7
Adjustments to Net Income

Net income disclosed by statutory notice of deficiency dated December 22, 1955		$64,471.50
As adjusted		42,675.85
Adjustment—reduction		$21,795.65
Reduction:		
(a) Dividends	$30,860.00	
(b) Increase in cash value	520.00	
(c) Accrued interest	592.47	$31,972.47
Addition:		
(d) Capital gain	$10,176.82	10,176.82
Total Adjustment Reduction		$21,795.65

Taxable Year Ended December 31, 1953
Schedule 7-a
Explanation of Adjustments

(a) The opinion of the Tax Court of the United States promulgated July 9, 1958, is that the transaction between the petitioner and J. I. Morgan, Inc., was a sale and the amount received in payment is not a dividend.

(b) The opinion of the Tax Court of the United States promulgated July 9, 1958, is that the annual increment in the cash value of an "Accumulated Investment Certificate" is not taxable as ordinary income.

(c) The respondent conceded that accrued interest in the amount of $592.47 was not includible in income.

(d) Capital gain on installment payment of $30,860.00 received from corporation, as shown in Exhibit "A" attached.

Schedule 8
Computation of Alternative Tax

Net income adjusted		$42,675.85
Less: Personal exemptions		1,200.00
Taxable income		$41,475.85
Enter one-half		$20,737.92
One-half of long-term capital gain		5,088.41
Balance		$15,649.51
Tax on $15,649.51		5,630.24
Multiply by two		$11,260.48
Plus: 52% of $5,088.41 × 2		5,291.94
Tax liability—joint return		$16,552.42
Liability disclosed by return		
A/c No. OR 1005232	$14,925.62	
23c—9/28/56—511785	1,216.02	16,141.64
Deficiency		$ 410.78

Taxable Year Ended December 31, 1953
Schedule 8-a
Statement of Account

Liability		$16,552.42
Assessed:		
EP 4445	$13,000.00	
Withheld tax	2,220.60	
OR 1005232	(294.98)	
511785	1,216.02	16,141.64
Deficiency to be assessed		$ 410.78

Liability		$16,552.42
Paid: Mar. 20, 1953	$ 1,000.00	
June 26, 1953	1,000.00	
Sept. 18, 1953	1,000.00	
Jan. 19, 1954	10,000.00	
Withheld tax	2,220.60	
Sept. 2, 1954	(294.98)	
Sept. 27, 1956	1,216.02	16,141.64
Deficiency in payment		$ 410.78

Taxable Year Ended December 31, 1954
Schedule 9
Adjustments to Net Income

Net income disclosed by statutory notice of deficiency dated December 22, 1955		$32,069.97
As adjusted		23,409.38
Adjustment — reduction		$ 8,660.59
Reduction:		
(a) Dividend	$20,514.27	
(b) Increase in cash value	570.00	
(c) Accrued interest	592.47	$21,676.74
Addition:		
(d) Capital gain	$ 3,738.53	
(e) Interest income	9,277.62	13,016.15
Total Adjustment Reduction		$ 8,660.59

Taxable Year Ended December 31, 1954
Schedule 9-a
Explanation of Adjustments

(a) The opinion of the Tax Court of the United States promulgated July 9, 1958 is that the transaction between the petitioner and J. I. Morgan, Inc. was a sale and the amount received in payment is not a dividend.

(b) The opinion of the Tax Court of the United States promulgated July 9, 1958 is that the annual increment in the cash value of an "Accumulated Investment Certificate" is not taxable as ordinary income.

(c) The respondent conceded that accrued interest in the amount of $592.47 was not includible in income.

(d) Capital gain on installment payment of $11,336.65 received from corporation as shown in Exhibit "A" attached.

(e) Interest income reported on the return was classified as a dividend in the statutory notice of deficiency, and it is included in income here as interest income.

Taxable Year Ended December 31, 1954
Schedule 10
Computation of Tax

Net income adjusted		$23,409.38
Less: Personal exemptions		1,200.00
Taxable income		$22,209.38
Tax liability—joint return		$ 6,119.56
Liability disclosed by return—		
A/c No. BF-5-100011	$ 6,163.54	
23c — 9/28/56 — 511786	3.72	6,167.26
Overassessment		$ 47.70
Reduced (See paragraph below)		47.70
Deficiency/Overassessment		None

There is no evidence of record that payments made by the petitioners were in excess of $6,119.56, the tax liability shown above. Accordingly there is no deficiency and no overpayment for the taxable year ended December 31, 1954.

INSTALLMENT SALE OF CAPITAL ASSETS
TO J. I. MORGAN, INC.

Contract receivable from corporation	$500,000.00
Add: Liabilities assumed by corporation	129,682.55
Total selling price	$629,682.55
Total basis of all assets sold—(explained below)	214,377.00
Gain on sale	$415,305.55

Gain on sale: 415,305.55/629,682.55 = 65.95475%

COMPUTATION OF ADJUSTED
BASIS OF ALL ASSETS SOLD

Depreciable Assets		Assets	Reserve for Depreciation
Dec. 31, 1948	Balances per prior Revenue Agent's Report	$317,619.66	$139,532.22
1949	Additions for year	16,542.10	56,365.06
	Totals	$334,161.76	$195,897.28
	Dispositions during year..	(4,584.00)	(4,069.00)
Dec. 31, 1949	Balances per returns filed	$329,577.76	$191,828.28
1950	Additions to Sept. 30, 1950:	41,018.66	32,348.22
	Garden Valley Roads in process of completion Cost 1-1-50 to 9-30-50	27,432.96	
	Bunk and cookhouses in process of completion Cost 1-1-50 to 9-30-50	11,970.67	
	Totals	$410,000.05	$224,176.50
	Dispositions 1-1-50 to 9-30-50	(7,282.66)	(4,042.91)

Sept. 30, 1950 Basis of Assets	$402,717.39	$220,133.59
Less equipment transferred to J. I. Morgan, Inc. on Apr. 25, 1952	(10,414.35)	(5,465.24)
Sept. 30, 1950 Balances	$392,303.04	$214,668.35
Less reserve for depreciation	214,668.35	
ADJUSTED BASIS OF DEPRECIABLE ASSETS SOLD	$177,634.69	
Other assets sold to corporation 10-1-50:		
Cash in payroll account	12,500.00	
Inventories Logs	1,000.00	
Inventories: Warehouse	23,242.31	
TOTAL TAX BASIS OF ALL ASSETS SOLD	$214,377.00	

AMOUNT TO BE INCLUDED IN INCOME

Year	Installment Paid	Percentage of Profit	Capital Gain at 50%
1950	$ 2,000.00	$ 1,319.10	$ 659.55
1953	30,860.00	20,353.64	10,176.82
1954	11,336.65	7,477.06	3,738.53

Received and filed September 18, 1958, T.C.U.S.

Tax Court of the United States
Washington

Docket No. 61346

J. I. MORGAN and FRANCES MORGAN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion filed July 9, 1958, directing that decision be entered under Rule 50, the parties filed an agreed computation for entry of decision on September 18, 1958. In accordance therewith, it is

Ordered and Decided: That there are deficiencies in income tax for the taxable years 1950 and 1953 in the amounts of $7.22 and $410.78, respectively; and that there are no deficiencies due from, or overpayments due to, these petitioners in income tax for the taxable years 1951, 1952 and 1954.

[Seal] /s/ G. G. WITHEY,
Judge.

Entered: September 23, 1958.

Served September 24, 1958.

In the United States Court of Appeals for the Ninth Circuit

T. C. Docket No. 61346

COMMISSIONER OF INTERNAL REVENUE,

Petitioner on Review,

vs.

J. I. MORGAN and FRANCES MORGAN,

Respondents on Review.

PETITION FOR REVIEW

To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

The Commissioner of Internal Revenue petitions the United States Court of Appeals for the Ninth Circuit to review the decision of the Tax Court of the United States entered in the above case on September 23, 1958, pursuant to its opinion filed July 9, 1958 (30 T. C., No. 89), in the consolidated causes of J. I. Morgan, Inc. vs. Commissioner of Internal Revenue, and J. I. Morgan and Frances Morgan, T. C. Docket Nos. 61345, 61346, ordering and deciding:

"That there are deficiencies in income tax for the taxable years 1950 and 1953 in the amounts of $7.22 and $410.78, respectively; and that there are no deficiencies due from, or overpayments due to, these petitioners in income tax for the taxable years 1951, 1952 and 1954."

This petition for review is taken and filed pursuant to the provisions of Sections 7482 and 7483 and other applicable sections of the Internal Revenue Code of 1954, as amended.

Jurisdiction

The petitioner on review is the duly appointed Commissioner of Internal Revenue of the United States, and the respondents on review, J. I. Morgan and Frances Morgan, husband and wife, residing at New Meadows, Idaho, filed their joint federal individual income tax returns for the taxable years ended December 31, 1950; December 31, 1951; December 31, 1952; December 31, 1953, and December 31, 1954, the years involved herein, with the Collector of Internal Revenue and/or the District Director of Internal Revenue for the District of Idaho, whose office is located at Boise, Idaho, which collection district is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, wherein this review is sought.

Nature of Controversy

This case involves deficiencies in federal income tax for the years 1950, 1951, 1952, 1953 and 1954.

The primary question submitted for review herein is:

Did the Tax Court properly hold that the annual increment in the cash value of an "accumulative investment certificate," owned by the respondents on review, who kept their books of account and filed

their income tax returns on the accrual basis, was not taxable as ordinary income during the years of the annual increments, but such increment was taxable only as capital gain upon retirement at maturity?

The respondents on review kept their books of account and filed their federal income tax returns on the accrual basis.

On or about August 10, 1937, J. I. Morgan acquired an "Accumulative Investment Certificate," Series F-232668, from Investors Syndicate (presently known as Investors Diversified Services, Inc.), of Minneapolis, Minnesota. Under the terms of the certificate, the issuing company agreed to pay to Morgan (with certain options) at the expiration of 15 years, an amount in excess of his aggregate payments. On September 28, 1952, J. I. Morgan exercised one of the available options to extend the certificate for an additional period of not more than 10 years.

The following is a detailed statement of the foregoing "Accumulative Investment Certificate":

Investors Syndicate
Minneapolis, Minnesota

Name Changed on 3-30-49 to: Investors Diversified Services, Inc.

Number—Series F232668
Dated 8-10-37
Annual Advance Payment for 15 years $600.00
Maturity in 15 years
(Option 13 elected 9-28-52 to continue not more than 10 years)
With optional settlement privileges.

Cash Value for each $25.00 Maturity	Year	To	Cash Value end of year	Paid In	Excess of Cash Value over amounts Paid In	Yearly Increase
$ 44	1		$ 220	$ 600		
134	2		670	1,200		
264	3		1,320	1,800		
400	4		2,000	2,400		
540	5		2,700	3,000		
700	6		3,500	3,600		
860	7		4,300	4,200		
1,024	8		5,120	4,800		
1,200	9		6,000	5,400		
1,418	10	8-10-47	7,090	6,000		
1,600	11	8-10-48	8,000	6,600		
1,810	12	8-10-49	9,050	7,200	$ 1,850	
2,020	13	8-10-50	10,100	7,800	2,300	$ 450
2,240	14	8-10-51	11,200	8,400	2,800	500
2,500	15	8-10-52	12,500	9,000	3,500	700
2,724	16	8-10-53	13,620	9,600	4,020	520
2,958	17	8-10-54	14,790	10,200	4,590	570

Since the respondents reported their income on the accrual basis, the Commissioner determined that the annual increases in the excess of the cash value over the amounts paid in represented interest taxable as ordinary income during each of the respective years of increase. Such action was consistent with uniform practice of the Internal Revenue Service with regard to bonds issued on a discount basis and held by an accrual basis taxpayer.

(See: Revenue Ruling 55-136; Revenue Ruling 56-299, 1956, 1 C.B. 603. C.B. 1955-1, 213-215; S.M. 3820, C.B. IV-2, 32; also G.C.M. 15875 C.B. XIV-2, 100.)

It is the position of the Commissioner, as set forth in the above rulings, that the amount received

upon the redemption of a bond or other evidence of indebtedness which represents original or initial discount constitutes "interest" which is taxable as ordinary income, and that it was never intended by Congress that it be treated otherwise.

The Commissioner accordingly determined that the annual increases in the excess of the cash value of an Investors Syndicate certificate over the amounts paid in represent interest taxable as ordinary income during the years of increase; the amounts thus determined to be taxable income to respondents for the years 1950, 1951, 1952, 1953 and 1954 are $450, $500, $700, $520 and $570, respectively.

Respondents contend that the annual increment in the cash value of such a certificate is not properly taxable during the years of increase, but is taxable only upon retirement at maturity as capital gain under Section 117(f) of the 1939 Code, which provides:

> Sec. 117. Capital Gains and Losses.
>
> (f) Retirement of Bonds, Etc.—For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor.

Citing and relying on its prior decision in George Peck Caulkins vs. Commissioner (1943) 1 T.C. 656, aff'd. (C.A. 6, 1944), 144 F. 2d 482, Tax Court accordingly held that under Section 117(f) of the 1939 Code and Section 1232(a) of the 1954 Code, insofar as here applicable, the amounts in question are taxable to the respondents on review as capital gain at the maturity of the certificates, rather than as interest income during the years of increase.

In the cited case, a retirement at maturity of an investment certificate issued at a discount, held by a cash basis taxpayer, was held to fall within Section 117(f). Here there was no retirement and the respondents were on the accrual basis and they continued to hold the certificates. It is, therefore, submitted that the decision of the Tax Court is erroneous and should be reviewed since it contravenes two clearly defined principles: (1) That the amounts paid to a bond or certificate holder by reason of his holding the obligation for a period of time are in the nature of interest and are taxable as such; and (2) that accrual basis taxpayers are taxable upon the annual increment in value of obligations where such increment presents an interest factor.

Statement of Points to Be Relied Upon

The following statement of points are to be relied upon herein:

1. In failing to hold and decide that the annual increment in the cash value of the certificate in-

volved herein is taxable to the respondents on review as ordinary income under Section 22(a) of the Internal Revenue Code of 1939 and Section 61(a) of the Internal Revenue Code of 1954, where applicable.

2. In holding and deciding that the annual increment in the cash value of the certificate involved herein is taxable to the respondents on review as capital gain at the maturity of the certificate under the provisions of Section 117(f) of the Internal Revenue Code of 1939 and Section 1232(a)(1) of the Internal Revenue Code of 1954, insofar as here applicable.

3. In holding and deciding that this case is controlled by its prior decision in the case of George Peck Caulkins vs. Commissioner (1943) 1 T.C. 656, aff'd. (C.A. 6, 1944), 144 F. 2d. 482.

4. In failing to hold and decide that the Caulkins case was erroneously decided or it is at least distinguishable on its facts.

5. In ordering and deciding that there are deficiencies in income tax for the years 1950 and 1953 only in the respective amounts of $7.22 and $410.78, and that there are no deficiencies in income tax for the years 1951, 1952 and 1954.

6. In that its opinion and decision are contrary to the revenue statutes and regulations promulgated thereunder and are not supported by the evidence of record.

Wherefore it is prayed that this petition for review be reviewed and the errors complained of herein be corrected, and the case remanded to the Tax Court of the United States for such purpose.

/s/ CHARLES K. RICE,
Assistant Attorney General,

/s/ ARCH M. CANTRALL,
Chief Counsel, Internal Revenue Service, Counsel for Commissioner of Internal Revenue.

Filed December 11, 1958, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 13, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation," including Exhibits 7-G through 11-K, L, M, and 23, in the case before the Tax Court of the United States docketed at the above number and in which the respondent in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 26th day of February, 1959.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the United States.

[Endorsed]: No. 16395. United States Court of Appeals for the Ninth Circuit. Commissioner of Internal Revenue, Petitioner, vs. J. I. Morgan and Frances Morgan, Respondent. Transcript of the Record. Petition to Review a Decision of the Tax Court of the United States.

Filed: March 9, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of Court of Appeals and Cause.]

No. 16395

PETITIONER'S STATEMENT OF POINTS AND DESIGNATION OF THE RECORD FOR PRINTING

Pursuant to Rule 17.6 of the Rules of this Court, petitioner hereby states that it intends to rely upon the following points on this appeal:

1. The Tax Court erred in holding that the annual increments during the tax years in the cash value of an "Accumulative Investment Certificate," owned by the taxpayer-husband, was taxable as capital gain upon retirement of the "Certificate" at maturity, under Section 117(f) of the Internal Revenue Code of 1939.

2. The Tax Court erred in failing to hold that the annual increments in cash value of the "Certificate" were taxable in the years of increment as interest income to the taxpayers, who kept their books and filed their income tax returns on the accrual basis.

Petitioner hereby designates for printing, as material to the consideration of this appeal, the following portions of the record.

Docket entries.

Findings of fact and opinion.

Agreed computation.

Decision.

Petition for review.

/s/ CHARLES K. RICE,
Assistant Attorney General, Attorney for the Commissioner.

Certificate of Service attached.

[Endorsed]: Filed March 12, 1959.